NO. 8781

United States Circuit Court of Appeals

For the Ninth Circuit

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UNITED STATES OF AMERICA,
Plaintiff and Appellee,

vs.

JESSE H. SHREVE, ARCHIE C. SHREVE, DANIEL H. SHREVE, GLEN O. PERKINS AND W. C. EVANS,
Defendants and Appellants.

BRIEF OF APPELLANTS

JESSE H. SHREVE AND ARCHIE C. SHREVE

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SUMMARY STATEMENT OF CASE

This cause is now on appeal for the second time. On the former trial the judgments were reversed and a new trial ordered. *Shreve vs. U. S.*, 77 Fed. (2nd) 2, decided April 29, 1935.

The defendants[1] were indicted by a grand jury of the United States for the District of Arizona on December 23, 1933,[2] (R. 1 to 38) for a violation of Sec. 215 of the Criminal Code (Sec. 338, Title 18, USCA) and Sec. 37 of the Criminal Code (Sec. 88, Title 18, USCA), commonly referred to in order named as the "mail fraud" and "conspiracy" statutes. The indictment is in twelve counts, the first eleven charging use of the mails in furtherance of schemes

1. Appellants will be referred to as "defendants" and appellee as "Government".

2. Defendants were previously indicted (Feb. 22, 1933) for violation of the same statutes, but a demurrer was sustained to that indictment during the taking of testimony on the trial.

to defraud, and the twelfth, a conspiracy to violate the remaining eleven counts of the indictment (R. 1).

On February 13, 1934, the cause first came on for trial before Honorable Albert M. Sames, and a jury, in the United States District Court at Tucson, and the defendants Jesse H. Shreve, Archie C. Shreve and Daniel H. Shreve were convicted upon the first eleven counts of the indictment and the jury disagreed upon the twelfth count; the defendant Glen O. Perkins was convicted upon the first four counts of the indictment; and the defendant W. C. Evans was convicted upon counts one and four of the indictment (R. 180). As stated above, upon appeal these judgments of conviction were reversed.

The cause came on for retrial on January 11, 1938, as to the defendants Jesse H. Shreve and Archie C. Shreve only, before Honorable Dave W. Ling and a jury, at Phoenix, Honorable Albert M. Sames having accepted a disqualification to retry the cause (R. 180).

Previous to the retrial of the cause, the defendant Daniel H. Shreve died, and the action was abated as to him (R. 181). The defendant Perkins was granted a severance after the former judgment of conviction was reversed and before the retrial of the cause (R. 181). He testified as a witness for the Government (R. 557). During this interim the indictment was dismissed as to the defendant Evans (R. 181). He also testified as a witness for the Government (R. 303).

At the time the cause was called for retrial, the twelfth count of the indictment (conspiracy count) was dismissed upon motion of the United States Attorney (R. 182). The defendants Jesse H. Shreve and Archie C. Shreve were again convicted upon the

eleven remaining counts of the indictment (R. 135, 136) and sentenced to four years imprisonment upon each count, sentence upon each count to run concurrently (R. 180).

The sufficiency of the evidence to sustain the verdicts is questioned in the particular that the evidence is insufficient to prove that these defendants mailed the indictment letters. All the evidence is therefore included in the bill of exceptions (R. 902). The entire charge of the Court is also included, because objection is made to some of the Court's instructions (R. 849).

STATEMENT AS TO JURISDICTION

This is a criminal case instituted in the United States District Court for the District of Arizona by a grand jury indictment charging defendants with a violation of Sec. 215 of the Criminal Code (Sec. 338, Title 18, USCA) and Sec. 37 of the Criminal Code (Sec. 88, Title 18, USCA). The jurisdiction of the Court below was invoked under Secs. 41 and 371, Title 28, USCA. The jurisdiction of this Court is invoked under Sec. 225, Title 28, USCA, as amended by the Act of February 13, 1925.

STATEMENT OF THE CASE

The Indictment

The first count (R. 1) of the indictment sets forth schemes to defraud by false pretenses and representations alleged to have been made by defendants in connection with a corporation organized under the laws of Arizona known as Security Building and Loan Association. The indictment alleges that, in carrying out the schemes set forth in this count, defendants would cause this corporation to be

organized and would maintain complete control of it, causing it to engage in the business of receiving deposits, issuing so-called pass books and investment certificates to depositors by solicitation and invitation, and that for the purpose of inducing such deposits, defendants would falsely pretend that the depositors' money could be safely and profitably invested; that such deposits would be secured by guaranteed capital and by first mortgages on Arizona real estate; that the association would pay six per cent interest on such deposits; that such deposits could be withdrawn, in whole or in part, at any time: that such deposits would be safely invested; that such deposits would be invested in sound mortgages on improved real estate carefully selected; that $300,000.00 of the capital stock of the association had been paid in, whereas the paid-in capital stock never exceeded $45,000.00; and that by means of such false pretenses large sums of money were obtained and deposited with the association. The indictment then alleges that defendants, for the purpose of executing such schemes, mailed the letters set forth in the first three counts of the indictment to the persons named therein (R. 6, 10, 12).

The fourth count (R. 14) of the indictment sets forth schemes to defraud, by pretenses and representations alleged to have been made by defendants, in connection with two corporations also organized under the laws of Arizona, known as Century Investment Trust and Arizona Holding Corporation. The indictment alleges that, in carrying out the schemes set forth in this count, defendants would cause Century Investment Trust to be organized and would maintain complete control of it and also Arizona Holding Corporation, theretofore organized under the laws of Arizona; that defendants would cause

Century Investment Trust to issue large amounts of its stock to defendants and to Arizona Holding Corporation; that defendants would cause these corporations to sell large amounts of stock to any and all persons who might be induced to purchase, and that for the purpose of obtaining money or property in exchange for such stock, defendants would falsely pretend that Century Investment Trust was in a solvent condition; that it was doing a large and profitable business; that it would have net earnings and income out of which dividends would be paid to stockholders; that dividends were paid out of net earnings and income when in fact they were paid out of capital supplied by defendants; and that by means of such false pretenses and representations large sums of money were obtained from the purchasers of such stock. The indictment then alleges that defendants, for the purpose of executing such schemes, mailed the letters set forth in the fourth and remaining counts of the indictment (R. 18 to 38).

The Facts

The Arizona Holding Corporation was organized in 1928 by defendant Glen O. Perkins for the purpose of raising funds to secure the capital required by the laws of Arizona to organize a building and loan association. The plan was conceived solely by Perkins (R. 630, 631). Difficulty was encountered in raising this capital and Perkins and one John C. Hobbs (who then had come into the venture) induced the defendants Jesse H. Shreve and Archie C. Shreve to associate themselves with it. L. C. James, Dr. C. A. Thomas and Dr. Bascom Morris originally interested themselves in Arizona Holding Corporation with Perkins and Hobbs, but they disposed of their interest to defendant Jesse H. Shreve, and his asso-

ciates, and withdrew from further participation in the company (R. 634). In March 1929, Security Building and Loan Association was organized for the purpose of carrying out the plan as conceived by Perkins (R. 212, 746). Difficulties were encountered in the operation of Arizona Holding Corporation. This prompted the organization of Century Investment Trust which was to own and control the stock of Security Building and Loan Association (R. 750). Approximately two years after its organization, Security Building and Loan Association became insolvent and ended in receivership. A like fate befell Arizona Holding Corporation and Century Investment Trust.

Evidence was introduced attempting to show that Arizona Holding Company, Century Investment Trust and Security Building and Loan Association were managed or controlled by defendants Jesse H. Shreve, Archie C. Shreve, Daniel H. Shreve (now deceased), Glen O. Perkins, and also John C. Hobbs who was not indicted. The indictment letters are signed by either Daniel H. Shreve, Glen O. Perkins, John C. Hobbs or R. F. Watt (R. 1 to 38). None is signed by defendants Jesse H. Shreve or Archie C. Shreve. The letter set forth in count one (R. 1), addressed to Fred Sweetland, enclosed a statement of the condition of Security Building and Loan Association as of December 31, 1930. The Government sought to show by Government witness-auditor Fierstone, that this statement was false, particularly as to the item of surplus and undivided profits (R. 692, 694). With one exception the indictment letters were mailed after the addressee named therein became investors with the companies to which the letter referred. That exception is the letter addressed to Mrs. Alice H. Davis (R. 29).

In a large part the evidence of the Government pertained to books of Arizona Holding Corporation, Century Investment Trust and Security Building and Loan Association, corporations named in the indictment. These books and records were audited by Government's witnesses Shroeder and Fierstone, both of whom were Federal agents doing accounting work (R. 654, 688). By summaries of these books, they sought to show that the indictment corporations were insolvent, and hence the pretenses and representations made by defendants with respect to the financial condition of these corporations were false.

The contentions of the Government, as we interpret the record, are:

First: The defendants Jesse H. Shreve and Archie C. Shreve, perceiving that Perkins and Hobbs had raised approximately $35,000 through sale of stock of Arizona Holding Corporation for the purpose of organizing a building and loan association, sought to divert that fund from the intended purpose of Perkins and Hobbs, and to this end secured $30,000 from the First National Bank of Prescott upon loans made by persons other than themselves, or the corporations involved[3]. The Government then sought to show that these individual loans were paid, not by the makers of the notes evidencing the loans, but by Security Building and Loan Association from funds deposited with it by Arizona Holding Corporation, these funds having been received by Arizona Holding Corporation as the result of a loan made by it to Overland Hotel and Investment Company, a corporation controlled by defendants Jesse H. Shreve and Archie C. Shreve[4]. Certificates of deposit totaling

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3. These notes were made by Joseph H. Shreve (a brother of defendants) Glen O. Perkins and J. G. Cash (R. 313, 314).

4. Testimony of Government's witness Schoeder (R. 687).

$50,000 were issued by the First National Bank of Prescott (R. 305, 306, 307).[5] They were made payable to the State Treasurer and were deposited with him for the purpose of securing the permit for Security Building and Loan Association to do business (R. 304). Subsequently these certificates of deposit were withdrawn and real estate mortgages and a surety bond substituted (R. 827). The certificates were then endorsed to Security Building and Loan Association (R. 306, 308). Thus, taking the Government's version of the case, Security Building and Loan Association repossessed this deposit, and Overland Hotel and Investment Company had secured a $30,000 loan from proceeds raised by the sale of stock of Arizona Holding Corporation.

Second: The Government relied greatly upon transactions reflected by deeds, mortgages, and assignments of mortgages, which were carried as assets upon the books of either Arizona Holding Corporation or Security Building and Loan Association. It was contended that no consideration passed between the parties thereto (R. 657 to 671).

Third: The ventures had their beginning in 1928. The principal operations were in the direful years 1930 and 1931. Arizona Holding Corporation, and its successor in purpose, Century Investment Trust, and Security Building and Loan Association failed in 1931 (R. 268, 272). The indictment alleges, and the Government sought to prove by the witness-auditors Schroeder and Fierstone that these companies were never solvent, and consequently the pretenses made by defendants, as set forth in the indictment, were false, and knowing they were false, defendants

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5. Of this amount $20,000 was deposited with First National Bank of Prescott by Arizona Holding Corporation (R. 309).

devised the schemes as alleged, and in furtherance of the schemes mailed the indictment letters.

QUESTIONS INVOLVED

1. Insufficiency of the indictment because of duplicity, which was raised by special demurrer (R. 40).

2. Insufficiency of the bill of particulars filed by the Government, which was raised by defendants' objection to the bill and motion to supplement it, which was denied (R. 85, 87).

3. Refusal to permit defendant Archie C. Shreve to testify on behalf of himself, and his co-defendant, with respect to conversations about which Governments' witnesses had testified, which was raised by objection by counsel for the Government (R. 761, 763, 764, 768, 769, 770, 779, 797).

4. Refusal to permit defendants to offer proof of the foregoing conversations, which was raised by the refusal of the trial judge himself to permit such offer of proof (R. 790, 791, 792, 793, 797).

5. Admissibility of exemplified copies of deeds, mortgages, and assignments of mortgages, which was raised by objection to their admission in evidence (R. 471, 472).

6. Admissibility of books and records of First National Bank of Prescott, which was raised by objection to the evidence (R. 300, 312, 313, 314, 318, 322, 334, 336, 338, 339).

7. Constitutionality of Section 695, Title 28, USCA, in its application to the admissibility of books and records of First National Bank of Prescott, which was raised by objection to the evidence (R. 300, 312, 313, 314).

8. Admission of books and records of Security

Building and Loan Association, Arizona Holding Corporation and Century Investment Trust, which was raised by objection to the evidence (R. 411).

9. Admission of testimony of Government witnesses based upon summaries of books and records of Security Building and Loan Association, Arizona Holding Corporation and Century Investment Trust, which was raised by objection to testimony (R. 658, 695).

10. Admitting in evidence a pamphlet relating to Century Investment Trust bearing fac-simile signature of defendant Jesse H. Shreve, which was raised by objection to the evidence (R. 723).

11. Admitting in evidence a mortgage executed by Wm. H. Perry to Yavapai County Savings Bank, which was raised by objection to the evidence (R. 547).

12. Admitting in evidence sheriff's deed executed to Yavapai County Savings Bank, which was raised by objection to the evidence (R. 551).

13. Admitting testimony of Government's witness Fierstone based upon his summary of books of Century Investment Trust relating to transactions after October 24, 1931, which was raised by objection to the evidence (R. 703, 704).

14. Refusing to permit defendants' witness Crane, a certified public accountant, to testify with regard to accepted accounting principles, raised by objection by counsel for the Government (R. 834).

15. Permitting Government's witness York to testify to communications with his daughter, which was raised by objections to the evidence (R. 560, 561).

16. The charge of the trial court with respect to proof of withdrawal of defendants from the

schemes alleged, which was raised by exception to the charge (R. 896).

17. Refusal of the trial court to charge the jury to disregard representations alleged in the indictment with regard to paid-in capital stock, which was raised by defendant's requested instructions (R. 898).

18. Insufficiency of the evidence to show that defendants mailed, or participated in the mailing, of the indictment letters, which was raised by motion for directed verdict (R. 101, 730, 849).

SPECIFICATION OF ASSIGNED ERRORS

Appellants rely upon the following Assignments of Error:

I (R. 904).

II (R. 905).

III-IV-V-VI-VII (R. 905 to 915).

VIII-IX-X-XI-XII (R. 915 to 920).

XIII-XIV-XV-XVI (R. 922 to 926).

XVIII-XIX-XX (R. 928 to 932).

XXI-XXII (R. 938, 939, 940).

XXIII (R. 941).

XXIV (R. 942).

XXV R. 943).

XXVI-XXVII-XXVIII-XXIX (R. 946 to 950).

XXXII-XXXIII-XXXIV-XXXV (R. 953 to 955).

ARGUMENT OF THE CASE

FIRST: THE TRIAL COURT ERRED IN OVERRULING DEFENDANTS' SPECIAL DEMURRER WHICH ATTACK THE INDICTMENT FOR DUPLICITY. THE ALLEGED FRAUDULENT SCHEMES ARE PLEADED IN COUNTS ONE AND FOUR OF THE INDICTMENT. BY THE LANGUAGE EMPLOYED IN COUNT ONE OF THE INDICTMENT, THE SCHEMES THERE PLEADED ARE INTERWOVEN WITH THE SCHEMES PLEADED IN COUNT FOUR. IN THIS WISE THE SEVERAL COUNTS OF THE INDICTMENT ARE JOINED.

ASSIGNMENT OF ERROR

I

The Court erred in overruling the special demurrer of defendants to the indictment, for the reason the indictment is duplicitous in that the fraudulent schemes, as alleged in counts one and four of the indictment, are interwoven, and the several counts of the indictment are joined, to which rulings defendants excepted (R. 904).

Defendants' special demurrer attacked the indictment on the ground, among others, that it is duplicitous (R. 39, 40 (d) (c)). The special demurrer was overruled, and defendants excepted (R. 101, 181).[6]

The indictment as it appears after the dismissal of the conspiracy charge (R. 182) is divided into two separate presentments. The first, comprising the first three counts, sets forth schemes and artifices for obtaining money by means of false pretenses, representations and promises in their relation to the Security Building and Loan Association (R. 1 to 14). The second, comprising counts 4, 5, 6, 7, 8, 9, 10 and 11, sets forth different schemes and artifices for obtaining money by means of false pretenses, representations and promises in their relation to the Arizona Holding Corporation and the Century Investment Trust (R. 14 to 38).

The following allegations appear in the second paragraph (count one) of the indictment:

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6. On the former appeal of the case, this court said the sufficiency of the indictment to charge an offense was not challenged. Shreve vs. U. S., 77 Fed. (2nd) 2, 4. The indictment was then challenged by special demurrer (Record on former appeal, No. 7460 p. 98-e), assigned as error (Record on former appeal, id 675 (5) and briefed (Brief of Shreves and Evans, id p. 129). The lower court, after the reversal by this Court, again considered the special demurrers an doverruled them (R. 101, 181).

"That prior to the dates on which the several letters, statements and writings *hereinafter referred to* were placed and caused to be placed in the United States Post Office, *as hereinafter* in the *several counts* of this indictment alleged * * *" (R. 2).[7]

And towards the end of the third paragraph (count one) of the indictment it is alleged as follows:

"the defendants would make and cause to be made the pretenses, representations and promises *hereinafter set forth* * * *"[8] (R. 3).

Thus, the first artifices and schemes run through the whole indictment, although the first three letters are pleaded in execution of the first artifices and schemes only (count one) and the next eight letters are pleaded in execution of the second artifices and schemes only (count two). In this method, therefore, the artifices and schemes are interwoven, although separated by numerical division only.

An indictment in several counts is a collection of separate bills, and every separate count should charge a defendant as if he had committed a separate offense. *De Jianne vs. U. S.*, (CCA3) 282 Fed. 737, 742; 31 C. J. 742. Counts may refer to each other for the purpose of supplying allegations common to all (31 C. J. 744) but here we have a comingling of offenses since different schemes and artifices, involving different corporations, are separated by numerical division only.

It may be contended that the intention of the pleader to separate the artifices and schemes in the indictment appears by implication or intendment,

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7. The correct recital should be 'as hereinafter referred to in this and the next two counts of this indictment".

8. The correct recital should be "hereinafter set forth in this count of this indictment".

but that is not enough, because the indictment charges crime, and therefore must necessarily state the crime with certainty and particularity. Nothing can be left to implication or intendment. 31 C. J. 659, 660.[9]

Giving, therefore, a meaning to words and phrases which will not distort them, the indictment is duplicitous and therefore bad. *Creel vs. U. S.* (CCA8) 21 Fed. (2nd) 690.

SECOND: THE BILL OF PARTICULARS ORDERED BY THIS COURT IN ITS OPINION REVERSING THE JUDGMENT ON THE FORMER APPEAL, DOES NOT COMPLY WITH THE OPINION, NOR WITH DEFENDANTS' DEMAND FOR A BILL OF PARTICULARS AS ALLOWED BY THE TRIAL COURT... THE BILL IS EVASIVE, INDEFINITE, AND INCOMPLETE, AND IT DOES NOT FAIRLY ADVISE DEFENDANTS OF THE EVIDENCE THEY WERE REQUIRED TO MEET. THE TRIAL COURT THEREFORE ERRED IN OVERRULING DEFENDANTS' OBJECTION TO THE BILL, AND IN DENYING DEFENDANTS' MOTION TO SUPPLEMENT IT.

ASSIGNMENT OF ERROR

II

The Court erred in overruling defendants' objections to the bill of particulars filed by the Government, and denying defendants' motion to supplement said bill of particulars, because (a) it is evasive, indefinite, uncertain and incomplete; (b) because the bill refers defendants to the transcript of testimony, and exhibits received in evidence, at the former trial of the cause; and (c) because the bill does not advise the Court or defendants of the evidence defendants were required to meet, to which rulings defendants excepted (R. 905).

In reversing this case on the former appeal this

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9. On the former appeal, counsel for the Government met this argument by saying that "any person of ordinary intelligence" will readily see what these allegations mean (appellee's brief in No. 7460, p. 25). Assuming that is true, it is the very thing the law condemns.

Court, contrary to the ruling of the lower court, held that the defendants were entitled to a bill of particulars before the retrial of the case. *Shreve vs. U. S.* 77 Fed. (2nd) 2, 9. The defendants filed a supplemental motion and demand for a bill of particulars and the trial court granted it (R. 60). The United States Attorney filed the bill (R. 60) and defendants objected to the sufficiency of it, and moved that it be supplemented (R. 85, 87). This objection was overruled by the trial court, and defendants excepted (R. 101, 181).

The motion to supplement the bill pointed out in detail wherein it failed to meet the demand for it. The bill, as filed, discloses that it left much to conjecture. For illustration, in answer to question 9 of the demand, the bill refers defendants to exhibit No. 314 introduced at the former trial (R. 68). In answer to questions 14 (R. 72) 16 (R. 74) 17 (R. 75) 18 (R. 76) and 20 (R. 78) the bill refers defendants to exhibits 110 to 118, inclusive, introduced at the former trial. The bill is typified by the following:

> "This question (question 16 of the demand) is answered by the books and records of the Century Trust introduced at the former trial, exhibits numbers 110 to 118 inclusive, and as amplified by the testimony of the witness C. K. Fierstone at the former trial." (R. 74).

The United States Attorney, apparently realizing the insufficiency of the bill, closes it with this nebulous statement:

> "And, as a further answer to all of the questions asked in the defendants' request for a bill of particulars, the Government states that all of the matters requested and not here specifically answered may be found in the transcript of the testimony at the former trial, all of which was

testified to in the presence of the defendants and their attorneys." (R. 81).

The solving of the ramifications of this case, as aptly stated by this Court on the former appeal, was still imposed upon defendants by the bill as filed.

The office of a bill of particulars is clear. It is stated by this court in *Kettenbach vs. U. S.*, 202 Fed. 377, 383, quoting with approval from *U. S. vs Adams Express Company*, 119 Fed. 240, as follows:

> "The office of a bill of particulars is to advise the court, or more particularly the defendant, of what facts more or less in detail, he will be required to meet, and the court will limit the government in its evidence to those facts set forth in the bill of particulars."

That decision is not compiled with as the bill stands. On the contrary, defendants were required to delve into exhibits, books and records, and into an unofficial transcript of testimony, to conjecture as to the evidence which would be produced against them. Besides, as we shall show under subsequent Assignments of Error, and particularly by the next Assignment of Error, the trial court did not limit the Government's evidence to the facts set forth in the bill of particulars.

THIRD: THE TRIAL COURT ERRED IN PERMITTING GOVERNMENT'S WITNESS FIERSTONE TO TESTIFY THAT STOCK OF SECURITY BUILDING AND LOAN ASSOCIATION HELD BY CENTURY INVESTMENT TRUST VALUED AT $99,457.50 WAS CHARGED OFF AS A LOSS ON DECEMBER 16, 1931, BECAUSE THAT IS A TRANSACTION WHICH OCCURRED AFTER THE LAST DATE OF ANY INDICTMENT LETTER OR PRINTED MATTER, AND BECAUSE IT OCCURRED SUBSEQUENT TO THE DATE ANY SCHEME WAS EXECUTED AS FIXED BY THE BILL OF PARTICULARS.

ASSIGNMENT OF ERROR

XXIV

The Court erred in permitting Government's wit-

ness Fierstone to testify, as an auditor for the Government, relative to transactions which occurred after October 24th, 1931, over the following objection and exception by counsel for defendants:

(The witness testified on direct examination): "There is also a charge against the accounts receivable to the Arizona Holding Corporation of $11,586.07, and on December 16th, 1931—

MR. HARDY: We object to any testimony, your Honor, after October 24th, 1931, because testimony after that date is not within the confines of the Bill of Particulars or the indictment.

THE COURT: Go ahead.

MR. HARDY: Exception.

THE WITNESS: On December 16th, 1931, the stock of the Guardian Western Company, then being valued at $845,000.00, was sold along with the other assets of the company to the Arizona Holding Corporation, this stock being sold for 231,145.05.

The witness continuing: That $231,146.05 was the purchase of this Guardian Western stock. Well, at that time the assets of Century Investment Trust were sold to the Arizona Holding Corporation and the liabilities were transferred, and the Century Investment Trust received a note from the Arizona Holding Corporation for the difference between the two, amounting to $250,000.00. The books do not record anywhere the payment of the note of the Arizona Holding Corporation to the Century Investment Trust. I believe that is still an asset of the company.

MR. FLYNN: Now, can you tell from the books, Mr. Fierstone, what became of the stock

of the Building & Loan Association which was held by the Century Investment Trust?

THE WITNESS: On December 16th, 1931, it was being carried at a valuation of—

MR. HARDY: Now, we make that same objection, your Honor. It is a transaction which occurred after the last date in the Bill of Particulars.

THE COURT: He may answer.

MR. HARDY: Exception.

THE WITNESS: On December 16th, 1931, it was being carried at a valuation of $99,457.50 and on that date it was charged off as a loss." (R. 942).

Government's witness Fierstone was an auditor employed in the Division of Investigation of the Federal Government (R. 688). He audited the books of Century Investment Trust and testified from this audit as a witness for the Government (R. 689). His testimony quoted in the foregoing Assignment of Error discloses that stock of Guardian Western Company, valued at $845,000, was sold on December 16, 1931, with other assets of that company, to Arizona Holding Corporation for $231,145.05 (R. 703). Guardian Western Company is not mentioned in the indictment, nor in the bill of particulars. The witness further testified that the assets of Century Investment Trust were sold, and its liabilities transferred, to Arizona Holding Corporation, and Century Investment Trust received a note from Arizona Holding Corporation for the difference amounting to $250,000 (R. 704). Thereupon counsel for the Government inquired from the witness as to what became of the stock of Security Building and Loan Association which was held by Century Investment Trust, to

which defendants objected because the question involved a loss transaction which occurred after October 24, 1931, which is the last date of any indictment letter, or scheme fixed by the bill of particulars (R. 703, 704). However, the witness was permitted to answer that the stock of Security Building and Loan Association, held by Century Investment Trust, was carried at a value of $99,457.50, and, on December 16, 1931, was charged off as a loss (R. 704).

This testimony with respect to this large item of loss, involving as it does the three corporations named in the indictment, went, therefore, to prove the insolvency of those corporations as alleged in the indictment (R. 4, 16). The bill of particulars fixed the devising of the schemes between May 1928, and October 24, 1931 (R. 61). October 24, 1931, is the latest date of any indictment letter (R. 11) and the trial court so charged the jury (R. 876). The testimony went beyond October 24, 1931, and thus, in the language of this court in *Kettenbach vs. U. S.*, supra, the trial court did not "limit the Government in its evidence to those facts set forth in the bill of particulars". Defendants were not advised that they would be required to meet testimony of this character, and obviously, in view of the limitation of the last date of the schemes fixed in the bill, the receipt of it placed defendants at a prejudicial disadvantage.[10]

Hass vs. U. S., (CCA8) 93 Fed. (2nd) 427, 435, 436.

It is true the trial court charged the jury that evidence relating to transactions subsequent to Oc-

10. Other pertinent testimony of transactions occurring after October 24, 1931, are found in the testimony of Government's witness Watt (R. 261, 608), Hammons (R. 524), and Fierstone (R. 705)... In order not to offend against the admonition of this court with respect to numerous assignments of error, no error is assigned upon the testimony of these witnesses, but reference is made to it for the purpose of enlarging the error which is assigned.

tober 24, 1931, could only be considered for the purpose of determining intent (R. 876) but defendants nevertheless were entitled to be advised as to what evidence the Government would offer to prove intent. *Kettenbach vs. U. S.*, supra.

FOURTH: THE WITNESSES HOBBS AND PERKINS TESTIFIED ON BEHALF OF THE GOVERNMENT CONCERNING CONVERSATIONS WITH DEFENDANTS JESSE H. SHREVE AND ARCHIE C. SHREVE. THE TRIAL COURT ERRONEOUSLY REFUSED TO PERMIT DEFENDANT ARCHIE C. SHREVE TO GIVE HIS VERSION OF THESE CONVERSATIONS, OR TO PERMIT DEFENDANTS TO MAKE OFFER OF PROOF IN RESPECT THERETO.

ASSIGNMENTS OF ERROR

III

The Court erred in refusing to permit defendant Archie C. Shreve to testify on his own behalf, and on behalf of defendant, Jesse H. Shreve, concerning a conversation between Government's witness Glen O. Perkins, said defendant Jesse H. Shreve, and himself, about which said Government's witness Perkins had previously testified. The grounds urged for the objection, and the exception taken, and the full substance of the testimony rejected, are as follows:

> The witness Archie C. Shreve testified on direct examination: "At or about the time the Century Investment Trust and the Security Building and Loan Association opened offices in Phoenix, I had a conversation with regard to the future business of those corporations at the office of the Security Building and Loan Association and the Century Investment Trust, in the Adams Hotel Building, here in Phoenix. My brother J. H. Shreve, Glen O. Perkins and myself were present at that conversation. To the best of my recollection, it was said at that meeting that the companies had opened for business, including the

Building and Loan Association at Phoenix, and things were not going so well. It was soon after the so-called great crash in 1929 and my brother J. H. Shreve came over to Phoenix from San Diego and stated that—

MR. FLYNN: Just a minute. At this time, your Honor, we object to the conversation between the defendants, for the reason that it is inadmissable. It is self-serving conversation between the defendants in this case.

THE COURT: Yes, purely self-serving.

THE COURT: If you want to get in a statement in the record that Perkins made, that is different. Conversations between these people are purely self-serving.

MR. HARDY: Not as between persons who had a conversation at which the witness Perkins was present, your Honor.

THE COURT: I say, if you want to get into the record Perkins' testimony—

MR. HARDY: Associate him with the companies. All right. Q. What was said to Mr. Perkins at that time?

MR. FLYNN: Object to that, no foundation is laid for it; no impeaching question was asked Mr. Perkins about any such conversation when he was on the stand.

THE COURT: I don't recall.

MR. HARDY: Certainly, Mr. Perkins testified about a conversation which he had with both Archie Shreve and J. H. Shreve.

THE COURT: All right, you have your conversation.

MR. HARDY: For the purpose of the record, may we have an exception, and I will try

to ask another question.

THE COURT: Yes, indeed.

MR. HARDY: Q. Now, you have stated that about this time there was a conference between Glen O. Perkins, J. H. Shreve and yourself?

A. There was.

Q. At Phoenix, Arizona?

A. Yes, sir.

Q. Was this conversation directed to Mr. Perkins, or did it, in any way, involve him with respect to a connection with either the Century Investment Trust or the Security Building and Loan Association?

A. It did, and about the conduct of this business.

Q. Now, state it.

MR. FLYNN: Object to it on the ground it is self-serving.

THE COURT: You are right back where you started from.

MR. HARDY: Your Honor ruled that the question may not be answered?

THE COURT: I ruled that it is purely self-serving.

MR. HARDY: Exception.

(The witness continuing): Mr. Perkins at that time had a conversation with me, or J. H. Shreve in my presence.

Q. What was that conversation?

MR. FLYNN: We object on the ground there is no foundation laid for any impeaching statement as to Mr. Perkins' statement, no impeaching question having been asked him at the time he was on the stand, and it is self-serving.

MR. HARDY: It is not laid for the purpose impeachment. The question was asked and predicated in regard to future business of the Century Investment Trust and the Arizona Holding Corporation. It is not asked for the purpose of impeaching—

MR. FLYNN: Well, it would be immaterial.

THE COURT: Well, it would only be self-serving.

MR. HARDY: The conversation Mr. Perkins had with either of these defendants?

THE COURT: Well, if you want to impeach the witness, you have to lay the foundation for it always.

MR. HARDY: I understand that.

THE COURT: Well, I am not going to argue with you.

MR. HARDY: Exception." (R. 905).

IV

The Court erred in refusing to permit defendant Archie C. Shreve to testify on his own behalf, and on behalf of defendant, Jesse H. Shreve, concerning a conversation between Government's witness Glen O. Perkins and John C. Hobbs, and said defendant Jesse H. Shreve, and himself, about which said Government's witnesses Glen O. Perkins and John C. Hobbs had previously testified. The grounds urged for the objection, and the exception taken, and the full substance of the testimony rejected, are as follows:

The witness Archie C. Shreve testified on direct examination: "I heard John C. Hobbs, who was a witness for the Government, testify on the occasion when he and Mr. Perkins came to San Diego in the summer or fall of 1931, and had a

conference with me and J. H. Shreve with reference to the affairs of the Security Building and Loan Association. I believe Mr. Perkins and my brother Daniel H. Shreve telephoned me and asked for J. H. Shreve or myself to come to Phoenix. I told them it was not possible for us to come here any they wanted to hold a conference with us and were attempting to borrow some funds for the Building and Loan Association. As to who was to make the loan I could not say. Mr. Perkins and Dan Shreve were the people asking for a loan on behalf of the Security Building and Loan Association or the Century Investment Trust. Mr. Perkins and Mr. Hobbs came to San Diego at their request.

Q. And what was said or done after they arrived in San Diego?

A. Mr. Perkins and Mr. Hobbs and myself, my brother J. H. Shreve—

MR. FLYNN: We object to any conversation at this conference, on the ground that no proper foundation has been laid, and neither Mr. Hobbs nor Mr. Perkins, when they were on the stand, no impeaching questions were asked, and the further ground it is self-serving.

THE COURT: Sustained.

MR. HARDY: Well, at this time Mr. Hobbs and Mr. Perkins came to San Diego, California, was there any discussion with respect to the business of either the Security Building and Loan Association, the Century Investment Trust or the Arizona Holding Corporation?

A. There was a discussion of the business of the Security Building and Loan Association, and the other companies may have been mentioned.

Q. And what was the nature of that discussion?

MR. FLYNN: We object to that on the ground it is immaterial, it is self-serving, and no foundation being laid for any impeaching question.

THE COURT: Yes, the same question.

MR. HARDY: Exception.

Q. Did you at any time, while these corporations, the Arizona Holding Corporation and the Security Building and Loan Association and the Arizona Holding Corporation were functioning, have any discussion with Mr. Perkins or Mr. Hobbs about the overhead expenses of those companies?

A. I did.

Q. Will you state please what that conversation was?

MR. FLYNN: I object to that on the ground that no time is fixed, that it is self-selving; no foundation being laid for an impeaching question.

THE COURT: Sustained.

MR. HARDY: Exception." (R.909).

V

The Court erred in refusing to permit the defendants to make an offer of proof with regard to the excluded testimony concerning the conversations between the defendants and the said Glen O. Perkins and John C. Hobbs, referred to in Assignments of Error III and IV. The error assigned is manifested by the following proceedings:

"MR. HARDY: May it please your Honor, in reference to the three questions which were asked of this witness pertaining to the conversa-

tion on December 20th, and the conversation early in the year 1930. and a conversation in February, 1930, between this defendant and the defendants J. H. Shreve and Glen O. Perkins, and J. C. Hobbs, which, upon objection by the United States Attorney, were held inadmissible, and which objection was sustained, may we have the privilege at this time, for the purpose of the record only, of making an offer of proof in regard to those questions?

THE COURT: No.

MR. HARDY: May we file with the Clerk of the Court a written offer?

THE COURT: You can do that if you want to, but you can't get it before the jury.

MR. HARDY: Can we make it without the presence of the jury?

THE COURT: No, you may write it out.

MR. HARDY: And may it be considered as a part of the evidence?

THE COURT: It would not be a part of the evidence because it is not admitted.

MR. HARDY: As part of the record in this case?

THE COURT: You can file it with the Clerk.

MR. HARDY: Then, may we have an exception to the refusal to be permitted to make the offer?

THE COURT: Yes." (R. 911).

VI

The Court erred in refusing to permit defendant Archie C. Shreve to testify on his own behalf, and on behalf of his co-defendant Jesse H. Shreve, concerning a conversation between Government's wit-

ness Glen O. Perkins, said defendant Jesse H. Shreve, and himself, with regard to Government's Exhibit 207, about which said Government's witness Glen O. Perkins had previously testified. The grounds urged for the objection, and the exception taken, and the full substance of the testimony rejected, are as follows:

"Q (By Mr. Hardy: Now, Mr. Shreve, I hand you Government's Exhibit No. 207, which is a pamphlet or a circular of the Century Investment Trust, and which was identified by Mr. Perkins, the witness for the Government in this case. Did you ever have any conversation with Glen O. Perkins with respect to that circular?

A. I have.

Q. State what the conversation was.

MR. FLYNN: Object to it on the ground the time and place and those present has not been fixed.

MR. HARDY: Q. Well, can you fix the time and place and who was present at the time you had this conversation with Mr. Perkins?

A. Early in 1930, January or February.

Q. Where?

A. At the office of the Century Investment Trust, Adams Hotel Building, Phoenix, Arizona.

Q. Who was present?

A. Myself and J. H. Shreve.

Q. Who else?

A. No one else.

Q. Was Mr. Perkins present?

A. I said Mr. Perkins, myself and J. H. Shreve.

Q. What was the conversation with Mr. Perkins in respect to that circular?

MR. FLYNN: We object to it on the ground it is hearsay, self-serving, and no foundation has been laid for any impeaching question.

THE COURT: Probably is self-serving.

MR. HARDY: Very well, your Honor. May we have an exception and may we also ask to make an offer of proof by filing it with the Clerk in connection with this Exhibit No. 207?

THE COURT: Very well.

MR. HARDY: And that the offer of proof is denied, and we may have an exception to the denial." (R. 913).

XXXV

The Court erred in refusing to permit defendant Archie C. Shreve to testify on his own behalf and on behalf of defendant Jesse H. Shreve, concerning a conversation between Government's witness Glen O. Perkins, said defendant Jesse H. Shreve, and himself, about which said Government's witness Perkins had previously testified. The grounds urged for the objection, and exception taken, and the full substance of the testimony rejected, are as follows:

The witness Archie C. Shreve testified on direct examination: "Mr. Perkins had a conversation with Dan Shreve and J. H. Shreve and myself in San Diego in connection with this matter in February, 1930.

Q. And how did that arise and what was done in that conference?

MR. FLYNN: We object to that on the ground, first, the question is a double question, and, second, as far as the last part is concerned, it is immaterial, and calling for a conversation that would be self-serving.

Q. Well, what was done with respect to your

connection with these companies at that conference?

A. Daniel H. Shreve, and when I refer to Dan, I mean Daniel H. Shreve all the time, had made two trips to Phoenix, and with the idea of taking—

MR. FLYNN: Just a minute, may I ask the witness a question?

MR. HARDY: Well, I don't think it is proper.

MR. FLYNN: I want to know whether he is answering your question or one he thought up himself. He asked what was done. You are talking about Dan Shreve, so it is—

THE COURT: I don't know what he is talking about.

MR. FLYNN: I want to know what Dan Shreve did before or after this happened. The question was directed to what happened after.

THE WITNESS: I want to tell you what happened at the conversation with Dan Shreve, Mr. Perkins and J. H. Shreve and myself, when we met in San Diego, California.

MR. HARDY: State that.

MR. FLYNN: State the conversation? We object to the conversation.

THE COURT: Why, it is not admissable, and I don't want any more of it. You are just wasting the Court's time by those tactics." (R. 955).

VII

The Court erred in refusing to permit defendants to make an offer of proof concerning the conversations between the defendant Archie C. Shreve and the said Glen O. Perkins, referred to in Assign-

ment of Error VI, and for the reasons set forth in that Assignment of Error (R. 914).

At the threshold of defendants' case, the trial court refused to permit defendant Archie C. Shreve to testify to conversations about which Government's witnesses Perkins and Hobbs had previously testified (R. 760, 761, 765, 768, 769, 770, 771, 778, 779, 797). Perkins organized Arizona Holding Corporation for the purpose of raising funds to organize Security Building and Loan Association (R. 630). The organization was not a plan of defendants, nor did they become associated with it until Perkins and Hobbs met difficulties, and then only at their solicitation (R. 633, 634). Perkins was indicted for the same offenses for which these defendants stand convicted, and he was convicted of some of them on the former trial (R. 180). Since that conviction he was granted a severance, and became a witness for the Government against defendants on this retrial of the case (R. 181). Hobbs joined Perkins in promoting Arizona Holding Corporation, and remained with that company, as well as Security Building and Loan Association, and Century Investment Trust, as did Perkins, until they failed. Perkins and Hobbs were so intimately associated with these companies, that conversations between them and defendants concerning matters of policy were as important to defendants as they were to the Government.[11] Perkins as a witness for the Government, testified as follows:

> "I had a conversation with Jesse Shreve when he was here just before the companies *closed.* That is the time Jesse Shreve told me he had made

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11. Both were officers of the corporations named in the indictment. They signed indictment letters as such officers (R. 8, 19, 23, 27, 28, 30).

an arrangement with Louis B. Whitney, an attorney in Phoenix, and Neri Osborne, Jr., a resident of Phoenix, to place these corporations in receivership and appoint Neri Osborne receiver. *He* spoke of liquidating the companies at a prior date. At the time of these conversations with Jesse Shreve in regard to these liquidations, *Archie Shreve was present.* That was before the conversation with Jesse H. Shreve in San Francisco. *Archie* was present the first time he spoke about liquidating the companies. That was in his home in San Diego. *Archie Shreve, Jesse H. Shreve and myself were present.* I think it was early in November of the year the building and loan closed. The building and loan closed in 1931. Mr. Whitney and Mr. Osborne were not discussed in the conversation in San Diego in which *Jesse Shreve, Archie Shreve, John Hobbs and myself were present in Jesse Shreve's home.* This conversation in San Diego *was prior* to the reference to these gentlemen." (R. 641, 642).[12]

Hobbs, as a witness for the Government, testified as follows:

"Before the building and loan association closed, I made a trip to San Diego by airplane. I think it was about a month before the building and loan association closed. *Glen Perkins was with me. J. H. Shreve and A. C. Shreve met me.* I had a conversation with *them* at that time which was to the effect that business conditions all over the country were poor, that we had over here a number of requests for withdrawals, and in view of the situation *as a whole*, it was perhaps best to *liquidate* the building and loan. I am

12. The wtness Perkins also detailed other conversations relating to defendants (R. 641, 642, 643, 645).

not certain that I was requested to sign anything at that time. Some time I was requested *to sign a schedule in bankruptcy.* I think that was shortly before the time the building and loan association closed. We had requests for withdrawals and in all cases were not able to fill the requests. *We didn't have the money.* I can't fix the time definitely in my mind but I know I was asked *to sign a schedule* about the time that the building and loan association went into bankruptcy."

Question by Mr. Peterson, counsel for the Government: "Can you recall who requested you?"

The witness: "I am not certain. It was either *J. H. Shreve* or Dan. It might has been *Archie.* I don't know. *I did not sign the bankruptcy schedule.*" (R. 389 to 392).

1. Defendants' version of these conversations was not immaterial, self-serving, or impeaching, which were the only grounds of objection interposed by Government counsel. The conversations were opened by the Government and defendants were then entitled to give the whole of their version of it.

Testimony of Perkins and Hobbs with regard to these conversations was important, because it referred to the indictment allegations of insolvency of the corporations named in the indictment, and also to defendants' connection with these corporations.[13] Hobbs testified he was requested by one of the defendants, or Daniel H. Shreve (a deceased defendant) to sign a bankruptcy schedule, and refused (R. 390 to 392). This inference was as damaging as it was significant. The whole of the excluded testimony was no less important, because it dealt with

13. Counts one and four of the indictment allege schemes and artifices to defraud, which are wholly predicted upon insolvency of the corporations named in the indictment (R. 1, 14).

matters about which Government witnesses Perkins and Hobbs had previously testified, as we have shown above. The conversations sought to associate defendants with the management of these corporations up to the time they failed. The defendant Archie C. Shreve would have disavowed such association had he been permitted to testify (R. 792, 793). Hobbs had already substantiated this profered disavowal by showing that after Daniel H. Shreve came to Phoenix in the spring of 1929 or 1930, he took charge of the business (R. 403, 404). The defendants both lived in San Diego and were engaged in business there. It is significant and important in this connection that neither defendant signed any indictment letter.

The repeated objections by counsel for the Government that this excluded testimony was immaterial, self-serving, and would impeach the witnesses Perkins and Hobbs are without support in law.[14]

> "The self-serving acts and declarations of accused are not admissable in his behalf, unless they are part of the res gestae, or unless they were done or made in a conversation part of which has already been introduced in evidence by the state." 16 C. J. Sec. 1265 (p. 636) referring to Sec. 1111 (p. 571) which is as follows:
>
> "Evidence is sometimes admitted, or its admission is held not error, on the ground that similar evidence has been introduced, or proof of the same character has been made, by the adverse party. This is but common fairness. * * * It is well settled that, where either the state or accused introduces part of a conversation, trans-

14. Instances of these objections, and the trial court's rulings sustaining the objections, are found at the following pages of the record: (R. 761, 762, 763, 764, 768, 769, 770, 778, 779, 797).

action, or writing, the opposing party is entitled to introduce other parts or the whole of the conversation, transaction, or writing, and it is sometimes so provided by code or by statute. Limitations to the rule are that the evidence offered must relate to the same subject matter, and must explain and be necessary to a full understanding of that already introduced." C. J. Sec. 1111 (p. 571).

The text above quoted cites in support *Carver vs. U. S.*, 164 U. S. 694, 17 Sup. Ct. 228, 41 L.Ed. 602. There the Supreme Court reversed a judgment of conviction because the defendant was denied the opportunity to prove his version of a conversation which had been introduced against him. The Supreme Court says:

"The sixth assignment of error was taken to the refusal of the court to permit the defendant to prove by Mary Belstead and Mary Murray the declarations of defendant, and what he said to deceased, and what she said to him, at the place of the fatal shot, immediately after the shot was fired, for the reason that the same was part of the res gestae, and was also a part of the conversation given in evidence by the government witnesses. We fail to understand the theory upon which this testimony was excluded. Hays and Brann, two witnesses for the government, had testified that they had heard the shots fired and the scream of a woman; that Brann started for the place, and met defendant running away; that defendant went back towards the woman, and then returned again, when Brann caught him and took him back to the woman, about 30 yards. About this time Hays came up, and and both testified as to the conversation or exclamations

that were made, between deceased and the defendant. Defendant's two witnesses, Belstead and Murray, appear to have come up about the same time, and, whether the conversations that took place between defendant and deceased at that time was part of the res gestae or not, it is evident that it was practically the same conversation to which the government's witnesses had testified. If it were competent for one party to prove this conversation, it was equally competent for the other party to prove their version of it. It may not have differed essentially from the government's version, and it may be that defendant was not prejudiced by the conversation as actually proved; but where *the whole or a part of a conversation* has been put in evidence by one party, the other party is entitled to *explain, vary, or contradict it.*"[15] (Italics supplied).

See: Nichols Applied Evidence, Vol. 5 pps. 4762 to 4767.

Thus, even where a statute limits the quantity of proof, testimony concerning a conversation excluded by the statute having been introduced by one party, warrants the adversary party to give his version of it. It is so decided by the Supreme Court in *Bogk vs. Gassert*, 149 U. S. 17, 24, 13 Sup. Ct. 738, 37 L.Ed. 631, where it is stated:

"In rebuttal, Steele and Gassert were put upon the stand and asked as to the conversation which took place at the attorney's office at the time the deeds and contract to reconvey were

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15. In the case quoted from the testimony excluded was offered by witnesses for defendant and not by the defendant himself. The situation is srengthened here because a defendant himself offered to give the excluded testimony. He should have been permitted to give the testimony not only on his own behalf but also on behalf of his co-defendant.

made. The conversation was admitted, and defendant excepted. Now, while this might have been improper as original testimony, it would have been manifestly unfair to permit Bogk to give his version of the transaction, gathered from conversation between the parties, and to deny the plaintiffs the privilege of giving their version of it. The defendant himself, having thrown the bars down, has evidently no right to object to the plaintiff's having taken advantage of the license thereby given to submit to the jury their understanding of the agreement. The Code is merely in affirmance of the common-law rule, and was evidently not intended to apply to a case of this kind."

Stevenson vs. U. S. (CCA5) 86 Fed. 106, 110, applies the rule and cites *Carver vs. U. S.*, Supra, in approval.

The objection by Government counsel that the rejected testimony was immaterial is refuted by the foregoing authorities. The objection that it would be impeaching has no support, because, rather, it was defendants' version of something already testified against them, so that objection is also refuted by the foregoing authorities. It is not self-serving under the foregoing authorities, and because the contrary has been decided by this Court.

Perrin vs. U. S. (CCA9) 169 Fed. 17, 24.

In accord are:

Nichols Applied Evidence, Vol. 5 p. 4763, 16 C. J. Sec. 1263 (p. 634).

Hinton vs .Welch, 179 Cal. 463, 177 Pac. 282.

Carstensen vs. Ballantyne, 40 Utah 407, 122 Pac. 82, 85.

2. The trial court erred in refusing defendants to make an offer of proof of this rejected testimony.

The trial court refused to permit defendants to make an offer of proof of their version of these conversations (Assignments of Error V and VII, supra). We submit it was unprecedented for the court to deny this offer of proof.[16] The court suggested the offer could not be made before the jury. Counsel for defendants requested that the jury be excused, which was denied (R. 790). The court became impatient with persistence and rebuked counsel for defendants.[17] Counsel for defendants persisted only because he thought his position was right.[18]

In view of the court's rulings, these offers of proof, as we have shown, were filed with the Clerk and probably are a part of the record on appeal by permission only. Since the trial court refused *to entertain* the offers, none was before him.

The error pointed out by the foregoing Assignments is plain. The effect is manifestly unfair and highly prejudicial, alone justifying, as we believe, a reversal of the judgments.

3. Refusal to permit defendant Archie C. Shreve to testify with regard to Government's Exhibit 207 concerning a conversation with Government's witness Perkins, was error.

Government's Exhibit 207 (Assignment of Error VI, Supra) was identified by Government's witness Perkins who testified that the *facsimile* signa-

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16. The offer of proof was filed with the Clerk (R. 790, 797). It is set forth in the Appendix (pp. 1 to 5), and appears at pages 790 to 794 and 797, 798 of the Record.

17. For instance, the learned trial judge said to defendants' counsel: "Well, I am not going to argue with you." (R. 763). Again: "Why, it is not admissable, and I don't want any more of it. You are just wasting the Court's time by those tactics." (R. 771). Upon reflection it must now appear that counsel was only attempting to inform rather than provoke the court. Respect for the Court naturally suppressed counsel.

18. Rule 43 (c) of Civil Procedure of District Courts (effective Sept. 1, 1938) adopted by the Supreme Court pursuant to Act of June 19, 1934, requires the trial court to do what the trial court refused here (See Rule, Appendix p. 5).

ture thereon is that of defendant J. H. Shreve (R. 653). The exhibit itself discloses that it is the *facsimile* signature of J. H. Shreve (R. 724, 727). Since Perkins gave testimony concerning the exhibit, by identifying it, then "the bars were down" for the defendants "to take advantage of the license thereby given to submit to the jury" (*Bogk vs. Gassert*, supra) their version of the circumstances connected with the preparation and distribution of this exhibit.

In convenient order, the next Assignment of Error XXV should be considered for the purpose of analyzing the foregoing Assignment of Error VI.

ASSIGNMENT OF ERROR XXV

Under sub (d) of Rule 24, this Assignment of Error is copied in full in the Appendix at page 6. It is summarized as follows:

The Court erred in admitting in evidence Government's Exhibit 207, which is a circular pertaining to Century Investment Trust, bearing the facsimile signature of J. H. Shreve. There was no proof that J. H. Shreve, or his co-defendant, mailed it or caused it to be mailed. It was hearsay and incompetent. It was received in the postoffice box of Government's witness Manuel J. King. It was not addressed to the witness, but was addressed to Manuel "K." King.

The exhibit, among other recitals, recites that Century Investment Trust owns control, or has stock ownership, in certain named corporations, without differentiation. It further recites, contrary to the indictment allegations, that Century Investment Trust is a prosperous, healthy growing corporation, and invited the addressee to join the company be-

fore the very early advance in price of the stock (R. 943).

The exhibit is long, so it is paraphrased in the Assignment of Error (R. 943). It is set forth in full in the record (R. 724). It is a lulling invitation to purchase stock of Century Investment Trust. While Perkins identified the exhibit (R. 653), and Government's witness Manuel J. King testified he received it through the mails (R. 722), it is addressed to Manuel "K." King (R. 724). It is not mentioned or displayed in the indictment. Defendant Archie C. Shreve was refused the opportunity to testify that defendants disavowed the exhibit, and that it be suppressed as soon as it was discovered (R. 796, 797, 798). It bore the *facsimile* signature only of J. H. Shreve (R. 727), and thus the imprint of that signature was available to anyone who had access to his genuine signature. There is not one word of evidence in the record that either defendant was in any manner connected with the exhibit, except it bore the *facsimile* signature of J. H. Shreve. Its harmful effect is exemplified by the incident that counsel for the Government introduced it as the dramatic climax to their case in chief, during the testimony of the last witness then called (R. 722, 727).

Aside from the fact the Court erred in refusing to permit defendant Archie C. Shreve to explain it (Assignment of Error VI, supra) error also follows the admission of the exhibit in evidence at all, because the only evidence connecting defendants with the exhibit is the testimony of Perkins identifying the *facsimile* signature of J. H. Shreve (R. 653), and the testimony of King that he received the exhibit through the postoffice (R. 722).

Defendants objected to the receipt of the ex-

hibit in evidence because it was hearsay, and incompetent, predicated upon the reasons stated in the objection (R. 723). No foundation whatever was laid for the admission of the exhibit. It was error to admit it, because in the absence of proof associating defendants with it, the *facsimile* imprint of the signature of defendant J. H. Shreve upon it was not enough. In *Hartzell vs. U. S.* (CCA8) 72 Fed. (2nd) 569, 578 it is said:

> "Ordinarily, where a writing is not shown to have been *executed* by the defendant, it cannot be offered in evidence against him. To be admissible in a criminal case, either to connect the defendant with the commission of the crime, or to procure a verdict against him, a writing must be established with that degree of certainty recognized as necessary to a conviction. *Sprinkle v. United States* (CCA4) 150 F. 56. *A writing, of course, does not prove itself, and there is no presumption that a telegram is sent by the party who purports to send it. McGowan v. Armour* (CCA8) 248 F. 676; *Drexel v. True* (CCA8) 74 F. 12; *Ford v. United States* (CCA9) 10 F. (2nd) 339. The Government was therefore bound under the established rules of evidence to prove that Hartzell was the person who sent these messages. * * * *" (Italics supplied).

Bearing in mind the damaging import of the whole exhibit, the erroneous admission of it at once implies its harmful effect, and, when coupled with the refusal of the trial Court to permit defendants to explain their connection with it, leaves no room to question the prejudicial effect of the error suggested.

FIFTH: THE INDICTMENT ALLEGES THAT THE DEFENDANTS FALSELY PRETENDED AND REPRESENTED THAT ALL MONEY DEPOSITED WITH THE SECURITY BUILDING

AND LOAN ASSOCIATION WOULD BE INVESTED IN SOUND FIRST MORTGAGES ON IMPROVED REAL ESTATE CAREFULLY SELECTED, WHEREAS SUCH MORTGAGES WERE AT ALL TIMES UNCOLLECTABLE AND PRACTICALLY WORTHLESS. THE TRIAL COURT ERRED IN ADMITTING IN EVIDENCE EXEMPLIFIED COPIES OF SUCH MORTGAGES, AND ALSO EXEMPLIFIED COPIES OF DEEDS AND ASSIGNMENTS RELATED THERETO, WITHOUT FIRST REQUIRING THE GOVERNMENT TO ACCOUNT FOR THE FAILURE TO PRODUCE THE ORIGINALS, OR IN ANYWISE LAY THE FOUNDATION FOR ADMISSION OF SECONDARY EVIDENCE THEREOF.

ASSIGNMENTS OF ERROR

VIII

The Court erred in admitting in evidence Government's Exhibit 125, which was received in evidence over the following objection and exception by counsel for defendants:

"MR. HARDY: May it please your Honor, we object to the introduction of Government's Exhibit No. 125 for identification for the reason that it appears to be an exemplified copy of a warranty deed recorded in the office of the Recorder of Maricopa County, Arizona. Do I assume, Mr. Peterson, that the exemplified copy is offered under the provisions of the—

MR. PETERSON: Of the Federal Statute.

MR. HARDY: Of the Federal Statute?

MR. PETERSON: And the State.

MR. HARDY: The Code of 1928?

MR. PETERSON: And also the Federal Statute.

MR. HARDY: We object, your Honor, for the reason the Federal Statute has no application to State records, and only applies to records of the Federal Government, or the officers of the Federal Government, and for the further reason the exemplified copy is not admissible under the provisions of the Arizona Code of 1928.

It would not be admissible under the rule in the Federal Court under the statute which was existing in the Territory of Arizona at the time of the admission of the Territory into statehood on February 14th, 1912; that under the statues of the Territory then existing there is no provision for the introduction of an exemplified copy of the records of a county recorder without proof that the original record is not within the possession or control of the party offering the document, and for that reason the exhibit is not the best evidence. It is hearsay as to these defendants; that only in the absence of a showing as required by the law existing at the time of the admission of the Territory into statehood, either the original only could be introduced, or of proof that the original is not in the control or possession of the party offering it.

THE COURT: Overrule the objection.

MR. HARDY: Exception."

The full substance of said exhibit is as follows: Exemplified copy of Warranty Deed dated December 20, 1930, executed by Arizona Holding Corporation by D. H. Shreve, President, R. F. Watt, Secretary, to Jas. M. Shumway, conveying Lot 3 in Block 2 of Goldman's Addition to the Town of Tempe, recorded on map or plat thereof of record in the office of the County Recorder of Maricopa County, Arizona, in Book 1 of Maps at page 49 thereof; acknowledged by D. H. Shreve and R. F. Watt as President and Secretary respectively before E. F. Young, Notary Public, December 20, 1930; filed and recorded at request of Arizona Title Guaranty and Trust Company May 12, 1931, W. H. Linville, County Recorder (R. 915).

IX

The Court erred in admitting in evidence Government's Exhibit 135, which was received in evidence over the following objection and exception by counsel for defendants:

"MR. HARDY: We object to the receipt in evidence of Government's Exhibit 135 for identification for the same reasons that we objected to the introduction of Government's Exhibit 125, and for the further reason that the exhibit has not been properly identified; no foundation has been laid for its admission.

THE COURT: Overrule the objection.

MR. HARDY: Exception."

The full substance of said exhibit is as follows: Exemplified copy Realty Mortgage executed December 30, 1930 by Lyda Dreyfus, mortgaging to Theo. Castle the Southeast Quarter of the Northwest Quarter of Section 3, Township 8 South, Range 18 West, Gila and Salt River Base and Meridian; Lot 3 in Section 3, Township 9 South, Range 18 West, Gila and Salt River Base and Meridian; Lot 1 in Section 5, Township 9 South, Range 18 West, Gila and Salt River Base and Meridian; all in Yuma County, Arizona; secures five promissory notes of even date calling for principal sum of $32,000, with interest at the rate of 8½% per annum, payable quarterly, $2000 due on or before one year after date, $2000 on or before two years after date, $2000 on or before three years after date, $8000 on or before four years after date, and $18,000 on or before five years after date; recorded at request of Security Title Company Jan. 5, 1931, A. K. Ketcherside, County Recorder by Lucy Frank, Dep. Rec; Assigned to Security Building and Loan Association Jan. 5, 1931, see Book 4 Assignments page 351, A. K. Ketcher-

side, Co. Rec. Released by instrument dated Nov. 4, 1931 see Book 8 Releases page 359, A. K. Ketcherside, Co. Rec. by R. P. Leatherman, Dep. Rec. (R. 917).

X

The Court erred in admitting in evidence Government's Exhibit 137, which was received in evidence over the following objection and exception by counsel for defendants:

"MR. HARDY: We make the same formal objection, your Honor, to the introduction of Government's Exhibits 136 and 137 for identification, for the same reasons we made to Government's Exhibit No. 125.

THE COURT: The same ruling.

MR. HARDY: Exception."

The full substance of said exhibit is as follows: Exemplified copy Assignment of Mortgage executed by Theo Castle January 5, 1931, acknowledged same date before Vivian Akerberg, Notary Public, San Diego County, California, consideration $10.00; assigns to Security Building & Loan Association mortgage dated Dec. 30, 1930, executed by Lyda Dreyfus to Theo Castle, which mortgage was recorded on Jan. 5, 1931 in Book 40 of Mortgages, page___ Blotter No. 57, in the office of the County Recorder of Yuma County, Arizona; recorded at request of Security B & L Assn Jan. 15, 1931, A. K. Ketcherside, County Recorder Yuma County (R. 918).

XI

The Court erred in admitting in evidence Government's Exhibit 142, which was received in evidence over the following objection and exception by counsel for defendants:

"MR. HARDY: We object to the receipt in

evidence of Government's Exhibit 142 for identification, for the same reasons that we objected to the introduction in evidence of Government's Exhibit 125.

THE COURT: Overruled.

MR. HARDY: And for the further reason, your Honor, it does not appear on the face of this document that it was signed at the request of either of the defendants now on trial.

THE COURT: It may be received.

MR. HARDY: Exception."

The full substance of said exhibit is as follows: Exemplified copy of Mortgage executed July 14, 1930, by A. E. Rayburn, a widow, mortgaging to Arizona Holding Corporation, consideration $8700.00, the West Half of Northwest Quarter of Northwest Quarter of Sec. 23, Tp. 1 N. R. 2 E. of the G. & S. R. B. & M., and acknowledged on July 21, 1930, before Roy C. Walters, Notary Public Maricopa County, Arizona; filed and recorded at request of Arizona Holding Corp. July 21, 1930, J. K. Ward, County Recorder. Notation: For release of this mortgage see Book 37 of Releases of Mortgage page 67; for assignment of this mortgage see Book 17 Assignments of Mortgages, page 115 (R. 919).

XII

The Court erred in admitting in evidence Government's Exhibit 143, which was received in evidence over the following objection and exception by counsel for defendants:

"MR. HARDY: We object to the receipt in evidence of Government's Exhibit No. 143 for identification, for all of the reasons for which we objected to the receipt in evidence of Government's Exhibit 125, and for the additional reason,

your Honor, because it appears upon the face of an assignment of mortgage, that it was executed by the Arizona Holding Corporation by D. H. Shreve, President, and by R. F. Watt, Secretary, and acknowledged before E. F. Young, a Notary Public. There is nothing upon the face of this document which discloses that either the defendants had anything to do with it, and in addition it appears that it is executed by D. H. Shreve, as President of the Arizona Holding Corporation, whereas D. H. Shreve is now deceased, and by reason of that fact, any acts or declarations made by the defendant, D. H. Shreve, during his lifetime, are not now admissible as against these defendants; for the reason that neither of these defendants now have the opportunity to examine the said D. H. Shreve with respect to the purposes or contents of this document, nor did they have such opportunity at the previous trial of this case, for the reason that the said D. H. Shreve was alive and a defendant in that action, and not subject to cross examination by any parties to that action.

THE COURT: The objection is overruled.

MR. HARDY: Exception."

The full substance of said exhibit is as follows: Exemplified copy of Assignment of Mortgage executed July 21, 1930, by Arizona Holding Corporation by D. H. Shreve President and R. F. Watt Secy, to Security Building and Loan Association, consideration $10.00, assigning to Security Building and Loan Association mortgage bearing date July 14, 1930, executed by A. E. Rayburn to Arizona Holding Corporation, which mortgage was recorded on July 21, 1930 in Book 244 of Mortgages, records of Maricopa County, Arizona, page 58, in the office of the County

Recorder of said county; acknowledged before E. F. Young, Notary Public of Maricopa County, Arizona, on same date, by D. H. Shreve and R. F. Watt, President and Secretary; filed at request of Security Bldg. & Loan Assn. Jan. 2, 1931, W. H. Linville, County Recorder of Maricopa County (R. 920).

The foregoing Assignments of Error VIII, IX, X, XI, and XII relate to the admission in evidence of exemplified copies of deeds, mortgages, and assignments of mortgages as evidence on behalf of the Government. These assignments of error are selected as examples of similar errors.[19] The materiality of these instruments to the criminal charges is manifested by the fact that they were utilized by the Government to prove indictment allegations that defendants falsely pretended that all money deposited with Security Building and Loan Association would be invested "in sound first mortgages", whereas such mortgages "would be and were at all times uncollectible and practically worthless" (R. 5). Government's Exhibit 125 (Assignment of Error VIII, supra) and Government's Exhibit 128 (R. 475) are illustrative of the whole situation. The comprehensive objection to all these exhibits was directed to Exhibit 125 (R. 471, 472) and that objection, by reference, was made to all remaining exhibits. (footnote 19).

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19. For illustration: Mason deed (R. 482); Valentine mortgage (R. 485); Mason assignment of mortgage (R. 487); Valentine deed (R. 488); Valentine deed (R. 489); Arrington mortgage (R. 491); Dreyfus mortgage (R. 493); Castle assignment of mortgages (R. 494); Arrington deed (R. 497); Dreyfus deed (R. 502); Arizona Holding Corporation deed (R. 512); Rayburn mortgage (R. 520); Arizona Holding Corporation assignment of mortgage (R. 515); Blackburn deed (R. 517); Arizona Holding Corporation deed (R. 512); Rayburn mortgage (R. 513); Arizona Holding Corporation mortgage (R. 518); York Mortgage (R. 562); York deed (R. 565); McLaws deed (R. 566); and McLaws deed (R. 567). The admission of these instruments is not assigned as error because of the admonition against numerous assignments of error. We refer to them for the purpose of enlarging the errors assigned.

Government's Exhibit 125 is an exemplified copy of a warranty deed executed by Arizona Holding Corporation, by D. H. Shreve, President, and R. F. Watt, Secretary, and delivered to Jas. M. Shumway, conveying to Shumway property in the Town of Tempe, Arizona (R. 471 to 473). Shumway in turn mortgaged this property to Security Building and Loan Association for $11,800.00 (Exhibit 126, R. 473, 474). Shumway also delivered to Security Building and Loan Association a note for $11,800 (Exhibit 127, R. 474) which was secured by the mortgage (Exhibit 126, supra). With respect to these instruments, Shumway, as a witness for the Government, testified:

> "When I signed these instruments all these typewritten places in Government's Exhibit 127 were in blank. I signed the note in blank and when I signed Government's Exhibit 126 it was in blank. I was not present when the mortgage was acknowledged. At the time I signed Government's Exhibits 126 and 127, being a note and mortgage, I did not know that any property had been deeded to me. I am the James M. Shumway mentioned in Government's Exhibit 125. At the time I signed the note and mortgage in blank, I did not know this property had been deeded to me." (R. 474, 475).

Shumway further testified:

> "With reference to Government's Exhibit 127, and to the inscription on that note "paid", I never paid anything to recover that note. That word was written on there after I received the note back. I was not paid anything for deed back. Government's Exhibit 128, being the deed from me to the Arizona Holding Company. That deed was given to me after the Building and Loan

closed, when I went over one morning to check in my business, the papers in Mesa, I called Dan Shreve to the door by telephone from the Adams Hotel, and asked him if the note and mortgage had been used that he asked me to sign some time before that. He said yes. I asked for how much and he said $11,800, and it would be necessary for me to deed back to the Building and Loan some property at Tempe before I could get that note and mortgage. I went over to the County Recorder's office and looked it up and saw where the property was located and went to Tempe and looked at the property and came back and told him I would sign this in order to get these papers back. I did not get any money when I signed the note and mortgage in blank. I never got any money at all from this deal." (R. 476, 477).

Government's Exhibit 135 (Assignment of Error IX, supra) in of like effect. This exhibit is an exemplified copy of a mortgage for $32,000 executed by Lyda Dreyfus to Theo Castle (R. 493, 498). Castle testified:

"I did not personally loan $32,000 on any property located in Arizona. I never loaned any money on that property described in Government's Exhibit 135. I presume I am the one named in this assignment of mortgage from Theo Castle to Security Building and Loan Association, being Government's Exhibit 136 for identification." (R. 494).

With reference to Government's Exhibit 135, supra, Lyda Dreyfus, the mortgagor, testified she did not receive $32,000 for signing the mortgage (R. 499).

The loans evidenced by the foregoing transactions were set up on the books of either Arizona Holding

Corporation, Security Building and Loan Association, or Century Investment Trust, and they were there audited by Government's witness Schroeder, who testified concerning them.[20]

By referring to each of these exhibits, and the objections made to their receipt in evidence, it will appear that counsel for the Government made no effort whatever to account for the originals (footnote 19, supra). Accordingly no foundation was laid justifying the admission of secondary evidence of these important instruments.

Defendants' objections to the admission of these exhibits were comprehensive (R. 471, 472).[21] Counsel for the Government, during the objections, stated they were admitted both under the Federal Statute and Arizona Code of 1928 (R. 471, 472). There is no applicable Federal Statute.[22] The Revised Code of Arizona of 1928, as we shall show, does not apply.

1. The admission of copies of recorded instruments in evidence in the United States District Court for the District of Arizona is governed by the statutes of Arizona existing at the time the Territory of Arizona was admitted into the Union.

Withaup vs. U. S. (CCA8) 127 Fed. 530.

Ding vs. U. S. (CCA9) 247 Fed. 12.

Neal vs. U. S. (CCA8) 1 Fed. (2nd) 637.

U. S. vs. Fay (D. C. Idaho) 19 Fed. (2nd) 620.

In the case of *Withaup vs. U. S.*, supra, the court had under consideration evidence relating to com-

20. He audited, and testified concerning, the following loans referred to in these assignments of error: York loan (R. 658); Dreyfus loan (R. 659); Rayburn loan (R. 661); Arrington loan (R. 667); and Shumway loan (R. 669).

21. The same objection was made to each exhibit (R. 475, 482, 485, 488, 491, 493, 494, 497, 502, 512, 513, 515, 516, 518, 519, 520).

22. Sec. 661, Title 28, USCA, applies only to records of Federal executive departments. Sec. 688, Title 28, USCA applies only to foreign records. These statutes are set forth in the Appendix, page 8.

parison of handwritings. The admissibility of the evidence resolved itself into the determination of what law of Colorado applied, that is to say, whether a statute adopted after the admission of Colorado into the Union, which was in effect at the time the case was tried, applied, or, whether the law, as it existed prior to that state's admission, applied. Judge Van Devanter, then speaking for the Circuit Court of Appeals for the Eighth Circuit, after an analysis of the law upon the subject, summarized it as follows:

> "From what has been said, it follows that the admissibility of the evidence under consideration must be determined, not by the statute of Colorado enacted in 1893, but by the common law, which, by reason of the territorial act of 1861, was the law of Colorado when it was admitted into the Union as a state."

Subsequently, this Court, in *Ding vs. U. S.*, supra, (247 Fed. 12) considered the competency of a witness to testify in a Federal District Court sitting in the state of Washington, who disavowed belief in a Supreme Being. At the time the territory of Washington was admitted into the Union, a witness was not disqualified to testify because of such disbelief. This Court decided that the law of the territory, as it existed when Washington was admitted into statehood, applied, and, citing *Withaup vs. U. S.*, supra, in approval, reversed the trial court. The opinion states the rule as follows:

> "We are of the opinion that the exclusion of the offered witness was erroneous, in that the court should not have determined the competency of the witness by the rules of the common law as in force in the respective original states of the Union when the Judiciary Act of 1780 was pass-

ed, but should have applied the rules which governed the competency of witnesses and the admissibility of evidence in force within the Territory of Washington when that territory was admitted to the Union."[23]

Having determined, therefore, that the law existing at the time Arizona was admitted into the Union governed the admission of copies of these instruments in evidence in the United States District Court in Arizona, we next proceed to ascertain the state of the law at that time.

Arizona was admitted into the Union on February 12, 1912, by the proclamation of President Taft signed on that date.[24] The lower court, and this court, take judicial notice of the proclamation. 23 C. J. p. 101, Sec. 1900.

The last *territorial* legislative enactments governing the admission of the foregoing instruments in evidence are found in the Revised Statutes of Arizona of 1901. The applicable provisions are Secs. 2546 and 2548 of those 1901 statutes.[25] They were amended at the first session of the legislature *after* the terri-

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23. The decisions on this question are collected in Neal vs U. S., 1 Fed. (2nd) 637, cited supra.

24. The proclamation is set forth in the Appendix, page 10. It is also found in Revised Code of Arizona, 1928, Preface 1v.

25. "Sec. 2546. Every instrument which is permitted or required by law to be recorded in the office of the county recorder and which has been proved or acknowledged in the manner provided by laws in force at the time of its execution, may be read in evidence without further proof; and the record of any such instrument or a duly cetified copy of such record may also be read in evidence with the like effect as the original, upon proof of affidavit or otherwise, that the original is not in the possession or under the control of the party offering such record or copy.

Sec. 2548. Certified copies under the hands and official seals, if there be seals, of all territorial and county officers, of all notes, bonds, mortgages, bills, accounts or other documents properly on file with such officers, shall be received in evidence on an equal footing with the originals in all suits now pending and which may be hereafter instituted in this territory, where the originals of such notes, bonds, mortgages, bills, accounts or other documents would be evidence."

tory was admitted into the Union.[26] Sec. 1743 of the Revised Statutes of 1913 omitted that part of Sec. 2546 of the Revised Statutes of 1901, which reads, "upon proof of affidavit or otherwise, that the original is not in the possession or the control of the party offering such record or copy". But, as we have seen, the 1901 statutes prevailed, and Sec. 2546 authorized the admission of copies of instruments there affected *only* upon proof "that the original is not in the possession or control of the party offering it." Sec. 1743 of the Revised Code of 1913 is identical with Sec. 4456 of the Revised Code of 1928, and Sec. 1745 of the Revised Code of 1913 is substantially the same as Sec. 4458 of the Revised Code of 1928, which latter section is copied at page 9 of the Appendix.

It is true that Sec. 2548 (footnote 25) authorizes certified copies of the documents there named, recorded with all county officers, to be received in evidence on an equal footing with the originals, where the originals would be evidence. But Sec. 2548, supra, does not apply to the instruments here. The governing statute is Sec. 2546 (footnote 25) since it is a special statute limited to instruments recorded in the office of *county recorders* only (as these were)

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26. Revised Statutes of Arizona of 1913. The sections comparable with those of the 1901 statutes are:

"**Sec. 1743.** Every instrument which is permitted or required by law to be recorded in the office of the county recorder and which has been proved or acknowledged in the manner provided by law in force at the time of its execution, may be read in evidence without further proof; and the record of any such instrument or a duly certified copy of such record may also be read in evidence with the like effect as the original.

Sec. 1745. Certified copies under the hands and official seals, if there be seals, of all state and county officers, of all notes, bonds, mortgages, bills, accounts or other documents properly on file with such officers, shall be received in evidence on an equal footing with the originals, in all suits now pending and which may be hereafter instituted in this state, where the originals of such notes, bonds, mortgages, bills, accounts or other documents would be evidence."

in contradistincttion to Sec. 2548, supra, which is a general statute applying to instruments recorded in the offices of all county officers. This is a repitition of an invariable rule of statutory construction.

59 C. J. p. 1056, Sec. 623.

Indian Fred vs. State, 36 Ariz. 48, 60, 282 Pac. 930, 935.

Since all these instruments were copies of records of county recorders (footnote 19) then their admissibility in evidence was governed by Sec. 2546 of the Revised Statutes of 1901, which provide that before they are admissible in evidence, the Government was required to prove the originals were not "in the possession or under the control of the party offering" them.

However, assuming the statutes leave a doubt, the question has been decided by the Supreme Court of Arizona in the case of *Mutual Benefit & Accident Association vs. Neale*, 43 Ariz. 532, 549, 33 Pac. (2nd) 604, 611, by an interpretation placed upon statutes of the same import as those invoked by the Government. The court reviewed analagous statutes through the Arizona Codes of 1887 to 1928. The question decided is stated by the Supreme Court of Arizona as follows:

> "It is the contention of plaintiff that section 4454, supra, makes all records of all public officers admissible in evidence, whenever anything which is stated therein as a fact may be material in any case pending in any court, and such record is prima facie evidence of the truth of the fact therein stated, regardless of the nature of the public record, or whether under the general rules of evidence it would have been excluded."

Deciding the question, the court said:

"These two separate sections were carried on substantially unchanged in the Civil Codes of 1901, pars. 2541, 2543, and 1913, pars. 1738-1740. Upon examining them it will be found that they refer to two distinct classes of records. Paragraph 1871 covers the records of notaries public, and certified copies of their records, as well as declarations, protests, and acknowledgements given by them, are not merely admitted in evidence, but are evidence of the facts stated therein, not ocnclusively, of course, but at least sufficient to make a prima facie case. On the other hand, the copies of all other records are only admissible when the records themselves would be admissible, and nothing is said as to their effect. *In other words, the effect of paragraph 1869 was merely to give a copy of the record the same effect as the original, leaving the general question of the admissibility and effect of the record to the general rules of evidence sanctioned by the common law.*" (Italics supplied).

And the court continuing:

"In view of the rule of the common law in regard to the admissibility of judgments in evidence, and the sound and indeed almost compelling reason supporting that rule, and of the revolutionary effect which a literal interpretation of the statute would have upon the law of evidence, we hold that under the consolidation of the two sections it was not the intention of the Legislature to abolish the general rules regarding the admissibility of evidence, and the records referred to in section 4454, supra, are still subject, so far as such admissibility is concerned, to those rules, but that when, under those general rules, they, or properly certified copies thereof,

are admitted, they are prima facie evidence of the facts stated therein."

In *Greenbaum vs. U. S.*, 80 Fed. (2nd) 113, 126, this Court considered the question of admitting secondary evidence of records of a Federal officer, which, except for the distinction with respect to records considered, is exactly similar to the question now presented. In the Greenbaum case, Federal statutes regulating the admission of copies of records in evidence were construed, which, in effect, are like the Arizona statutes. In rejecting secondary evidence, this Court states reasons therefor, which the Supreme Court of Arizona could have adopted in the case cited without affecting the logic of the conclusion of that Court. In the Greenbaum case this Court said (p. 126):

"An equally serious error committed in the receiption of these cards was the inexplicable violation of the best evidence rule."

* * * *

28 USCA, Sec. 661 provides:

"Copies of any books, records, papers, or other documents in any of the executive departments * * * shall be admitted in evidence equally with the originals thereof, when duly authenticated under the seal of such department."

* * * *

"The government seeks to avoid the effect of this mass of authority by the assertion that the cards offered in evidence were 'public records,' and that hence, in some manner, any and every violation of the law of evidence committed in their introduction magically vanishes.

There can be no doubt that official records kept by persons in public office, which records are required to be kept either by statute or by

the nature of the office, are admissible to prove transactions occurring in the course of official duties, within the personal observation of the official recording the transactions, without any further guarantee of their accuracy. (Citing authorities).

Assuming that the cards introduced in evidence in this case were public records within the meaning of the above cases, that conclusion does not cure the violation of the hearsay and best evidence rule discussed above. Giving them the full import of the public record rule is merely to conclude that the figures on the card were accurately transcribed from the income tax return in Washington. It throws no light on who signed the original return, hence makes the original return no less inadmissible hearsay. The public nature of these cards may vitiate hearsay in the transcription, but it cannot vitiate hearsay in what is transcribed. The fact that a record is public adds nothing to what is recorded. * * *" (Citing authorities).

Thus, the instruments here involved were not admissible simply because they bear the exemplification of county recorders with whom they were recorded. They are copies of purported originals, and hence, in addition to the limitation of the statutes themselves, are further circumscribed by "the general rules of evidence sanctioned by the common law," as stated by the Supreme Court of Arizona in *Mutual Benefit Health & Accident Ass'n vs. Neale*, supra, and as applied by this Court in *Greenbaum vs. U. S.*, supra. "The general rules of evidence sanctioned by the common law," of course, mean that the best evidence available must be produced, if accessible, and if not, then the next best evidence will be admitted

(22 C. J. p. 974, Sec. 1220) but then only upon a showing that the original evidence is not available. 22 C. J. p. 1045, Sec. 1342.

Thus, the statutes cited, in themselves, point out the error asserted, but had they not, the interpretation placed upon comparable statutes by this Court, and by the Supreme Court of Arizona, does point out the error.

2. *This Court is now bound to follow the statutes of the State of Arizona, and interpretations placed upon such statutes by the Supreme Court of Arizona.*

In view of *Withaup vs. U. S.* and *Ding vs. U. S.*, above cited, probably more should not be said with respect to the law which should have been followed by the trial court in admitting copies of these documents in evidence. Had doubt existed, the question is now set at rest by the Supreme Court in the epochal case of *Erie Railroad Company vs. Tompkins*, 82 L. Ed. (Advance Opinions p. 787), 58 Sup. Ct. Rep. 817, decided April 25, 1938. The Supreme Court there held that, since there is no federal common law, the law to be applied by Federal Courts in any case, except in matters governed by the Federal Constitution, or by Acts of Congress, is the law of the State, and whether that law is declared by statute, or by decision of its highest court, is not a matter of Federal concern. In so deciding, the Supreme Court disapproved the doctrine of *Swift vs. Tyson*, rendered almost a century before in 16 Peters 1, 10 L. Ed. 865. The prevailing rule as announced in *Erie vs. Tompkins*, is as follows:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its

highest court in a decision is not a matter of federal concern. There is no federal general common law."

Thus, there is no alternative affording escape from the error of the trial court in admitting copies of these documents in evidence without accounting for the originals. The voluminous and prejudicial testimony relating to them, and founded upon them was inadmissible, because the foundation for such testimony was the incompetent documents concerning which the testimony pertained.

SIXTH: THE GOVERNMENT'S WITNESS WATT TESTIFIED HE RE-WROTE THE BOOKS OF CENTURY INVESTMENT TRUST AND ARIZONA HOLDING CORPORATION AT THE DIRECTION OF THE DECEASED DEFENDANT, DANIEL H. SHREVE, FROM RECORDS NOT MADE BY HIM, AND FROM INFORMATION OBTAINED BY HIM FROM WHATEVER SOURCES AVAILABLE. HE ALSO TESTIFIED MANY ENTRIES IN THESE BOOKS ARE REFLECTED INTO THE BOOKS OF SECURITY BUILDING AND LOAN ASSOCIATION. THE TRIAL COURT ERRED IN ADMITTING THESE BOOKS IN EVIDENCE, SINCE THEY WERE NOT ORIGINAL ENTRIES OF THE TRANSACTIONS THERE RECORDED, ARE NOT THE BEST EVIDENCE, AND ARE HEARSAY.

ASSIGNMENT OF ERROR

XVIII

The Court erred in admitting in evidence Government's Exhibit 61, which was received in evidence over the following objection and exception by counsel for defendants:

"MR. HARDY: We object, your Honor, to the introduction of Government's Exhibits Nos. 61 to 70, inclusive, for identification, for the reason that no proper foundation has been laid for the admission of these books, and for the additional reason that the books are hearsay, and that they are not the best evidence of all or of many of the transactions appearing in such books. For the further reason that the entries therein

are not the primary or original entries, because it now appears from this testimony of Mr. Watt, who is a witness for the Government, that these books were rewritten from information, data, and from books or records, and from information which came into his possession or under his observation after he became employed by the Century Investment Trust or the Arizona Holding Corporation, and that such data and books and records were not prepared by him, and, therefore, these books as a result are a transcription of entries, memoranda or records which were made by other persons. For the further reason that it appears from the indictment herein that the last letter appearing in such indictment is October 24th, 1931, and that the testimony of the witness Watt is, that many of the entries in these books and records were made and reflected transactions after that date. We further object to the admission of these exhibits marked for identification, for the reason that they are incompetent, irrelevant and immaterial, and for the further reason that there (it) has not been shown by the Government that either of the defendants herein made any of such entries, dictated the making of any such entries, or that they knew that any of such entries were made in such books, and in such exhibits."

The full substance of said exhibit is as follows: General Ledger of Century Investment Trust, under one binder, subdivided and marked: Assets, Liabilities, Revenues and Expenses. First entry under Assets November 30, 1931, account No. 111, Notes Receivable; Account No. 112, Accounts Receivable; Account No. 114, Insurance Accounts Receivable; Account No. 116, Accrued Interest Receivable. First

entry under Liabilities October 30, 1929, Account No. 200 authorized capital stock Preferred; Account No. 200-A, unissued capital stock Preferred; Account No. 201, authorized capital stock Common; Account No. 201-A, unissued capital stock Common; Account No. 202, authorized capital stock Series A Preferred; Account No. 202-A, unissued capital stock Series A Preferred; Account No. 203, capital account Preferred; Account No. 204, capital account Common; Account No. 205, capital account Series A Preferred; Account No. 206, Capital Surplus; Account No. 207, earned surplus; Account No. 208, Reserves; Account No. 209, Contingent Fund; Account No. 212, Reserve for Premiums; Account No. 220, Notes and Mortgages Payable; Account No. 223, Contingent Commission Account; Account No. 225, Profit and Loss; First entry under Revenues, October 23, 1931, Account No. 300, interest earned; Account No. 304, stock and bond sales; Account No. 305, cost of stock and bond sales; Account No. 306, Real Estate sales; Account No. 307, cost of real estate sales; Account No. 308, insurance commissions earned; Account No. 315, rentals; Account No. 325, miscellaneous earnings; First entry under Expenses November 30, 1930, Account No. 400, General Expense; Account No. 401; Insurance Department Expense; Account No. 402, Property expense; Account No. 411, Commissions paid on sale of capital stock; Account No. 415, commissions paid (R. 928).

XIX

The Court erred in admitting in evidence Government's Exhibit 70, for all the reasons urged in Assignment of Error XVIII. The full substance of said exhibit is as follows: Stockholders' Ledger Arizona Holding Corporation, subdivided: Real Estate,

Stocks and Bonds, Notes Receivable, Accounts Receivable, Notes Payable, Accounts Payable, Real Estate; first entry dated 6-12-31, including West half Lots 6 and 7, Blk. 16, Mesa; Lots 5 and 6, Blk. 231 of Tucson, with notation "This property came from Mary Robson for stock of Century Investment Trust." Stocks and Bonds: showing various stock transactions with Century Investment Trust, entitled "Insurance Securities Corporation". Notes Receivable includes O. H. and Mary Robson dated 1-23-30 for $1500.00, due 4-23-30, security 740 shares preferred stock Century Investment Trust and 400 shares common stock Century Investment Trust. Accounts Receivable includes items Citizens State Bank, John C. Hobbs, Mesa Agency, Glen O. Perkins, W. H. Perry, O. H. Robson, Security Building and Loan Association. Notes Payable includes items of Century Investment Trust note dated 12-16-21, amount $250,000.00, payable 12-16-36; also note Century Investment Trust dated 5-16-32, amount $12,800.00, due 12-31-33; also Mary Robson note, payable 11-1-30, secured by 80 shares preferred and 80 shares common and 80 shares Series A preferred stock Century Investment Trust; also James M. Shumway note dated 2-23-32, amount $550.00, dated 2-23-37. Accounts Payable, containing miscellaneous accounts with Arizona National Bank, Century Investment Trust, D. H. Shreve and R. F. Watt (R. 931).

XX

Under Sub. (d) of Rule 24, this Assignment of Error is copied in full in the Appendix at page 12. It is summarized as follows:

It relates to the admission in evidence of Government's Exhibit 71, which is the general ledger of Security Building and Loan Association. The re-

ceipt of this exhibit in evidence was objected to for the reason that the book, embraced by the exhibit, is not a record of the original entries, but are transcribed entries; because it is hearsay and not the best evidence; and because it is not shown that these defendants directed or caused any of the entries in these books to be made (R. 932).

The exhibits embraced by these Assignments of Error are books of accounts of either Arizona Holding Corporation, Century Investment Trust or Security Building and Loan Association. They are voluminous and unwieldly, consequently by order of the trial court (R. 901, 902) they, and the remaining books of accounts of these corporations, have been transmitted to the Clerk of this Court pursuant to Sub. (4) of Rule 14.[27]

Exhibit 61 (Assignment of Error XVIII, supra) is the general ledger of Century Investment Trust (R. 355). Exhibit 70 (Assignment of Error XIX, supra) is the stockholders' ledger of Arizona Holding Corporation (R. 368). Exhibit 71 (Assignment of Error XX, supra) is the general ledger of Security Building and Loan Association (R. 412). Government's witness Schroeder, an auditor who testified as a witness for the Government, partly utilized the books of Arizona Holding Corporation and Security Building and Loan Association to prepare his audit and from which he gave testimony (R. 654, 655). Government's witness Fierstone, an auditor who also testified on behalf of the Govern-

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27. These Exhibits are numbered 61 to 78, inclusive (excluding Exhibit 76). They are all books of accounts of either Arizona Holding Corporation, Century Investment Trust or Security Building and Loan Association. The admission of Exhibits 61, 70 and 71 are selected under the foregoing Assignments of Error as typical of all of them.

ment, prepared his audit from the books of Century Investment Trust (R. 688, 689).

On the former appeal this Court, in addressing itself to the admissibility of these books, said:

> "As to the books of the corporations named in the indictment, which corporations it is alleged were mere instrumentalities of the defendants in the perpetuation of the fraudulent scheme, it is clear that these books were admissible without further proof than the connection of the defendants with the organization and control of these corporations. * * * *Shreve vs. U. S.*, 77 Fed. (2nd) 2, 7.

We appreciate the import of the foregoing rule, but we cannot conclude it is inflexible. We thnik we are justified in saying that the rule, if literally applied to this record, goes farther than any heretofore announced by this Court.[28] We believe this Court, upon re-examination of the rule in its application to the present record, will conclude that, notwithstanding the sweep of the rule, it does have a limitation beyond which there may be error.

The testimony of Government's witness Watt, in connection with the exhibits embraced by these Assignments of Error, is sufficiently important to justify that it be set out in the bill of exceptions, for the most part, by questions and answers (R. 344 to 352). Since the testimony comprises several pages, we have transcribed it in the Appendix beginning at page 19.

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28. Cf. Cullen vs. U. S. (CCA9) 2 Fed. (2nd) 524, 525, where it is said: "The defendants Cullen and Dennison were the corporation. They owned the stock and had entire control and ownership of the corporate property." In that situation corporate books were admitted without proof that Cullen and Dennison authorized the entries or had knowledge of them. That, undoubtedly, is a correct conclusion, but the record here does not disclose a parallel situation.

In connection with the testimony of Government's witness Watt, it is important to consider that the record does not disclose that these defendants supervised or dictated the making of a single entry in the books of either Century Investment Trust, Arizona Holding Corporation or Security Building and Loan Association. It is manifest from the testimony of Watt, that many entries in the books were made upon his own responsibility. It is not an exaggeration to say that they were his books. He testified he rewrote the general ledger (Exhibit 61) of Century Investment Trust (R. 344) and brought to date books of Arizona Holding Corporation (R. 347, 348) and that entries from those books were reflected into the books of either Century Investment Trust or Security Building and Loan Association (R. 347, 348, 349). A significant part of his testimony is that Government's Exhibit 61 (Assignment of Error XVIII, supra) which is the general ledger of Century Investment Trust, was *rewritten* by him at the direction of Daniel H. Shreve, a deceased defendant (R. 344, 345). With respect to that important book, therefore, these defendants should not be held accountable, and it is an important book, because it was not only a general ledger, but it was also the book principally utilized by Government's witness Fierstone in the preparation of his audit (R. 691, 692). *Furthermore, Watt testified that neither of these defendants ever requested him to rewrite these books, nor counseled with him in the rewritting of them* (R. 347). Watt testified that he rewrote the books of Century Investment Trust "from whatever information I could get the necessary information from — from whatever source, I should say." (R. 344). Again he testified, "To a great extent I relied upon information *I found myself* in order *to rewrite* these books." (R. 345).

Again, "I did not rewrite any books of the Security Building and Loan Association, *except trace entries* in the Building and Loan books which pertained to the Century Investment Trust or Arizona Holding Corporation. I traced them from the *rewritten* books of the Century Investment Trust." (R. 347). Again, "There had been no entries made in the books of Arizona Holding Corporation since November 4th or 5th, 1929. *I opened* a set of books and brought them up to date." (R. 347, 348).

In view of the former opinion, more cannot be said to point out the error in admitting these books in evidence. We think we are justified in saying that the rule announced by this Court upon the former appeal, in connection with the admission of these books, was not intended to apply a situation such as now appears from this record.

It follows from the error in admitting in evidence the foregoing books of account of Century Investment Trust, Arizona Holding Corporation and Security Building and Loan Association, that the testimony of Government's witnesses Fierstone, based upon his audit of those books, was erroneous, as will appear from the next Assignment of Error.

SEVENTH: THE TRIAL COURT ERRED IN PERMITTING GOVERNMENT'S WITNESS FIERSTONE TO TESTIFY WITH RESPECT TO AN AUDIT MADE BY HIM OF BOOKS OF CENTURY INVESTMENT TRUST, FOR THE REASON SAID BOOKS WERE NOT ADMISSIBLE IN EVIDENCE, AS SHOWN BY THE TESTIMONY OF GOVERNMENT'S WITNESS WATT RELATING TO THESE BOOKS. THE TESTIMONY OF THE WITNESS FIERSTONE CONCERNING THIS AUDIT WAS THEREFORE BASED UPON BOOKS WHICH DID NOT CONTAIN THE ORIGINAL ENTRIES OF THE TRANSACTIONS THERE RECORDED; IT WAS NOT THE BEST EVIDENCE, AND WAS HEARSAY.

ASSIGNMENT OF ERROR XXIII

The Court erred in permitting Government's witness Fierstone to testify from, and in regard to, a summary which he made from books and records of Century Investment Trust, which testimony was admitted over the following objection and exception by counsel for defendants:

> "MR. HARDY: Your Honor, we now object to the witness giving any testimony based upon an audit of the books of the Century Investment Trust for the reason that it has been testified by a witness for the Government, Mr. Watt, that these books, in their entirety, were rewritten by him, and therefore, they are not the original or first permanent entries of the books of the Century Investment Trust, and the Government's witness, Watt, further testified that the records and data and memorandum from which the books were re-written, were filed with other books, records and memorandum of the Century Investment Trust; and for the further reason that it has not been shown by the Government thus far that these defendants, or either of them, caused the books of the Century Investment Trust to be re-written, or that they knew that they were re-written, or that they acquiesced in their re-writing them; therefore, generally, the books are hearsay, incompetent, irrelevant and not the best evidence as to the defendants on trial.
>
> THE COURT: Overruled.
>
> MR. HARDY: Exception." (R. 941).

The witness Fierstone was an auditor employed by the Federal Bureau of Investigation (R. 688). He made an audit of the books of the Century Invest-

ment Trust, and testified therefrom as a witness for the Government (R. 694).

The books and records of Century Investment Trust were not admissible in evidence, as has been shown by Assignments of Error XVIII, XIX and XX. Since these books and records of Century Investment Trust were not admissible in evidence as against these defendants, an extended discussion of the admissibility of testimony of Government's witness Fierstone, based on the audit thereof, is unnecessary, because the error follows as a natural sequence.

EIGHTH: THE COURT ERRED IN ADMITTING IN EVIDENCE RECORDS OF THE FIRST NATIONAL BANK OF PRESCOTT, ARIZONA. THE FIRST NATIONAL BANK OF PRESCOTT IS NOT MENTIONED IN THE INTICTMENT, NOR IN THE BILL OF PARTICULARS. EVIDENCE ON BEHALF OF THE GOVERNMENT DISCLOSED THAT THESE RECORDS WERE NOT IDENTIFIED BY THE PERSONS WHO MADE THEM. ACCORDINGLY NO PROPER FOUNDATION WAS LAID FOR THE ADMISSION OF THESE RECORDS IN EVIDENCE; THEY ARE NOT THE BEST EVIDENCE; AND ARE HEARSAY. THEY WERE NOT ADMISSIBLE UNDER THE ACT OF CONGRESS OF JUNE 20, 1936 (SEC. 695, TITLE 28, USCA) BECAUSE THAT ACT, IF APPLIED TO THIS CASE, IS VOID IN THAT IT OFFENDS THE FEDERAL CONSTITUTION BY NOT REQUIRING THAT DEFENDANTS BE CONFRONTED WITH THE WITNESSES AGAINST THEM; IT IS EX POST FACTO, BECAUSE THE INDICTMENT WAS RETURNED BEFORE THE ACT BECAME EFFECTIVE; AND IT DEPRIVES DEFENDANTS OF DUE PROCESS OF LAW.

ASSIGNMENT OF ERROR

XIII

The Court erred in admitting in evidence Government's Exhibit 84, which was received in evidence over the following objection and exception by counsel for defendants:

> "MR. HARDY: Your Honor, we object to the introduction of this exhibit, for the reason that it is apparent therefrom that some of the items on the pages offered would not be admis-

sible against the defendants in this case, and for the reason no proper foundation has been laid for the admission of the offered exhibit, and for the second reason, it appears from the witness himself that they are not the first or original or primary documents or information from which the entries are made. The witness himself has said they are transcribed entries.

THE COURT: It may be received.

MR. HARDY: Exception."

The full substance of said exhibit is as follows: A transcription of the general ledger of the First National Bank of Prescott, as follows:

RESOURCES	FRIDAY Nov. 8, 1929
Loans & Discounts	$315,355.34
U. S. Gov't Securities	149,880.71
Other Bonds, Stocks, etc.	60,342.70
Leasehold Improvements	3,677.36
Furniture & Fixtures	3,314.86
Interest Paid	2,235.48
Expense General	9,555.32
Suspense	134.44
Stationery and Supplies	2,405.93
Federal Res. Bank, L.A.	28,197.27
Chase Natl. Bank, N.Y.	21,369.58
Western Nat. Bank, L.A.	9,012.30
Boatmens Nat'l Bank, St. Louis	8,970.36
Pacific Nat. Bank, S.F.	3,662.36
1st Nat. Bk. Ariz., Phoenix	831.06
Com'l Nat. Bk. Phoenix	8,471.00
El Paso N/B, El Paso	1,673.89
Transit—Cash Col's	1,186.13
Exchange Maturing	20,000.00
Over & Short	29.90

Cash on Hand	20,715.21
Gold Bullion	781.40
	$678,163.34

LIABILITIES

Capital Stock	$100,000.00
Surplus	25,000.00
Undivided Profits	6,554.04 (red)
Interest Received	9,816.22
Exchange	157.55
Safe Dep. Rentals	134.00
Escrow Fees	28.00
Other Earnings	6.75
Certified Checks	--
Cashiers Checks	8,549.39
Cashiers Vouchers	--
Demand Deposits, Com'l	288,765.23
Demand Certified Dep.	--
Time Deposit Savings	125,448.61
Time Cert.—Dep.	18,220.00
Time Pub. Funds	75,000.00
Postal Savings	27,037.59
	$678,163.34 (R. 922).

XIV

The Court erred in admitting in evidence Item 4 of Government's Exhibit 90, which was received in evidence over the following objection and exception by counsel for defendants:

"MR. HARDY: We object to its admission, upon the grounds it has not been properly identified, no foundation has been as yet laid by this witness, or any other witness, for its admission, and for the further reason that it is not the first permanent entry of the transaction, and it is hearsay as to these defendants.

THE COURT: It may be received.

MR. HARDY: Exception."

The full substance of Item 4 of said exhibit is as follows: Record—letter of First National Bank of Prescott, dated March 8, 1929, addressed to First National Bank of Phoenix, Arizona, enclosing collections and credit items, which includes an item dated March 7, 1929, No. 38, Maker Arizona Holding Corporation, payor, 91-11, amount $20,000; last endorser Us. (R. 924).

XV

The Court erred in admitting in evidence parts of Government's Exhibits 92, 93 and 94, which were received collectively in evidence over the following objection and exception by counsel for defendants:

"MR. FLYNN: We offer in evidence, if the Court please, the parts of Government's Exhibits 92, 93 and 94, which the witness has identified, and in order to keep the record straight as to the part of the exhibits which is going into the record, we ask leave to read them into the record. We are also offering the printed heading which shows what the entries are in regard to.

MR. HARDY: (On voir dire examination of the witness) Mr. Evans, did you testify that these entries were made in your own handwriting, the ones referred to by Mr. Flynn?

A. Yes, the entries on the first line under date of March 7th, over to that column including the amount.

Q. Are those the first permanent entries on that transaction, or are they reflected from other records or memoranda of the Bank?

A. That is only an auxiliary record or memorandum record.

Q. Well, is it the first record of the transaction?

A. It is not.

Q. It is a secondary record?

A. A secondary record.

MR. HARDY: We object to the introduction of the portions of the exhibits referred to by Mr. Flynn, for the reason that it appears they are not the first record of the transaction; for the second reason that no proper foundation has been laid for the admission; that they are hearsay as to these defendants, and that from the exhibits themselves, they appear to be records referring to transactions between the Bank and Joseph E. Shreve, J. G. Cash, and Glen O. Perkins.

THE COURT: They may be received.

MR. HARDY: Exception."

The full substance of said Exhibits 92, 93 and 94 are as follows:

(Exhibit 92): The heading Maker: Shreve, Joseph E., Care of Southwest Union Securities Corporation, San Diego, California, under the date March 7th, 1929; Security or endorser, 3-7-29, endorsed Jesse H. Shreve, Certificate 100, Sunset B. and L. Association, San Diego, $12,500.00; per cent, 7; Number, 127; Amount, $10,000.00.

(Exhibit 93): Maker: Glen O. Perkins, 101 Scott Street, Tucson, Arizona, under date of March 7th, 1929; Security or endorser, 3-7-29, 200 Security G. and L., Tucson, endorser, J. H. Shreve; per cent, 7; Number, 128; Amount $10,000.

(Exhibit 94): Maker: Cash, J. G., address 101 Scott Street, Tucson; Date, March 7th, 1929; Security or endorser, 100 Security B. and L. Association, Tucson; Endorser, J. H. Shreve (R. 924).

XVI

That if the exhibits referred to in Assignments of Error XIII, XIV and XV were admitted in evidence under the authority of Section 695, Title 28, USCA, then the Court erred because (1) the offenses charged in the indictment are alleged to have been committed before the enactment of said Act; (2) that by the express terms of said Act it is prospective only, and therefore said Act did not, and could not, apply to the trial of this case; (3) that if said Act is construed to apply to the trial of this case, notwithstanding the objections raised in subdivisions 1 and 2, supra, then said Act is unconstitutional and void as to these defendants, because (a) it dispenses with the necessity of confronting defendants with the witnesses against them in violation of the Sixth Amendment of the United States Constitution; (b) it alters the legal rules of evidence and requires less or different testimony to convict defendants than the law required at the time of the commission of the alleged offenses, and thus the Act is ex post facto in violation of Section 9, Article 1, of the Constitution of the United States; (c) it deprives defendants of their liberty without due process of law in violation of the Fifth Amendment to the Constitution of the United States (R. 926).

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1. Records of First National Bank of Prescott were admitted in evidence as a part of the case of the Government. Admission of these records in evidence was error because no foundation was laid for their admission; they were not original entries; and were hearsay.

The foregoing Assignments of Error relate to transactions reflected by books and records of the First National Bank of Prescott. The Government sought to prove these transactions by the witnesses Trott, Evans and Faulkner. Trott was a teller R.

294). Faulkner was also a teller and assistant cashier (R. 333). Evans was the cashier and director of that bank (R. 303). Evans was indicted for the same offenses for which these defendants were convicted, and he was convicted upon the first trial of the case (R. 181). Before the retrial of the case, the indictment was dismissed as to Evans (R. 181) and he testified for the Government on the retrial (R. 303).

The foregoing Assignment of Errors are selected as examples of errors which relate to the omission in evidence of many records of the First National Bank of Prescott (R. 294 to 343). The First National Bank of Prescott is not named in the indictment (R. 1 to 38) and it is not mentioned in the Bill of Particulars (R. 60 to 81).

The records received in evidence related to a loan of $30,000 made by the First National Bank of Prescott, which apparently was obtained upon three separate notes for $10,000, each signed, respectively, by Joseph G. Shreve (not the defendant Jesse H. Shreve, R. 311) by Glen O. Perkins and J. G. Cash. (Government exhibits 92, 93, 94, R. 313 and 314). *The notes themselves were not offered or received in evidence.* There were introduced in evidence auxiliary or memorandum bank records only of this loan, embraced by Exhibit 84 (R. 298 to 302) Exhibits 92, 93, and 94 (R. 313, 314) and item 4 of exhibit 90 (R. 309).

These exhibits are embraced by the foregoing Assignments of Error XIII, XIV, and XV. Defendants objected to the receipt of these exhibits in evidence because no foundation had been laid for their admission; because they were not the original entries; and were hearsay (R. 300, 309, 312, 313).

Exhibit 84, and Item 4 of Exhibit 90, both of

Beginning with the word "but" in line 22, page 75, and ending with the word "endorser" in line 24, substitute the following:

but no one actually testified the defendant Jesse H. Shreve actually signed the original notes as endorser. The witness Evans testified that "J.H.Shreve which is entered here (referring to the bank memoranda of the original notes, i.e. Exhibits 92, 93 and 94) as endorser of the notes is the defendant Jesse H. Shreve." (R. 314)

which are related to Exhibits 92, 93 and 94, were inadmissible for the reason stated in the foregoing Assignment of Error XIII and XIV, and for the reasons stated in the objection made to them, as pointed out above (R. 300, 309, 312, 313).

By its decision on the former appeal, this Court said:

> "The record contains many other assignments of error relating to the admissibility of books of corporations other than those named in the indictment. With reference to these rulings, it will be sufficient to say that in order to make them competent as against the defendants it is essential to show that the defendants made such entries or caused them to be made or assented thereto."

Shreve vs. U. S., 77 Fed. (2nd) 2, 7.

The records of these loans admitted in evidence over the objection of defendants, as above pointed out, disclose that the endorser upon the notes evidencing the loans to which they relate, apparently was J. H. Shreve, but no one testified that he is the defendant Jesse H. Shreve in this case, or that he actually signed the notes as endorser. The notes evidencing the loan were not offered or received in evidence, nor were they accounted for. Hence, we have the admission of secondary evidence to associate the defendant Jesse H. Shreve with these important transactions. The defendant, Archie C. Shreve, was not in any manner associated with the transactions, either by testimony or records.

With reference to Government's Exhibit 84, Government's witness Trott testified as follows:

> "I made all the items on this page of the exhibit. They were transcriptions of the general

ledger entries covering that day's business, November 8th. This page on this exhibit does not contain the first and original entry of the transaction. The original entries are in the general ledger. This is a transcription of the day's business. It is a transcription of the general ledger, the items transferred from the general ledger to the daily statement, in order to get a picture of the day's business of the bank condensed. Neither J. H. Shreve nor A. C. Shreve supervised or requested me, or required me to make any of the entries on this page of the exhibit. I don't remember whether they had any connection with the First National Bank of Prescott at that time or not. There was no connection with them on my making these entries at that time. It was a part of my duty at the bank on that particular day. I cannot remember that J. H. Shreve and A. C. Shreve were officers or directors of the First National Bank in Prescott at that time." (R. 299, 300).

With reference to Item 4 of Government's Exhibit 90, Government's witness Evans testified as follows:

"The payment for the certificates of deposit was delivered to me by Mr. Brewer. There was a check for $20,000 and some notes accepted subject to the approval of the Board of Directors of the Bank. I know that Government's Exhibit 90 for identification was the form of record that was used by the bank in its collection of items. I have some recollection in regard to the fourth item. That entry is a correct record of the transaction which it purports to record (R. 308).

I did not make the entry referred to in this exhibit. It is not the first original entry of the

transaction. As I stated, it is only the record of items. I believe we refer to it in the letter as cash collection, a letter containing items sent to other banks for collection and credit. There are other records with respect to this transaction." (R. 309).

With reference to Government's Exhibits 92, 93 and 94, Government's witness Evans testified as follows:

"The J. E. Shreve mentioned in this debit memo is not the defendant Jesse Shreve but is Joseph E. Shreve. The Glen Perkins is the Glen Perkins who is co-defendant in this case. The entry on Government's Exhibit 92 for identification was made by me. The original entry on March 7th up to this part was made by me. The first half of the card, over to the column "amount", and all these items on the left, were made by me, and this is one of the records of the bank. It is an auxilliary or memorandum record. We term it the liability ledger card, the description of the note. The nature of the record is what we call a liability record indicating the amount of money being owed by any particular borrower. That entry is a correct record of the transaction which it purports to record. The entry of March 7th, 1929, on Government's Exhibit 93 in evidence, was made by me. It is similar to the record in Government's Exhibit 92. These entries were made by me over to the column "Amount". The right-hand entries were not made by me. Government's Exhibit 94, the entry on that exhibit is a similar exhibit as of the bank. That entry was made by me also. All of those entries which I have identified were

correct records of the transactions which they purport to record.

MR. FLYNN: We offer in evidence, if the Court please, the parts of Government's Exhibits 92, 93 and 94, which the witness has identified, and in order to keep the record straight as to the part of the exhibits which is going into the record, we ask leave to read them into the record. We are also offering the printed heading which shows what the entries are in regard to.

MR. HARDY: (on voir dire examination of the witness) Mr. Evans, did you testify that these entries were made in your own handwriting, the ones referred to by Mr. Flynn?

A. Yes, the entries on the first line under date of March 7th, over to that column including the amount.

Q. Are those the first permanent entries on that transaction, or are they reflected from other records or memoranda of the Bank?

A. That is only an auxilliary record or memorandum record.

Q. Well, is it the first record of the transaction?

A. It is not.

Q. It is a secondary record?

A. A secondary record." (R. 311, 312).

Therefore, in addition to violating the decision of this Court on the former appeal, admission of these secondary records violates the best evidence and hearsay rules prevailing in the following decisions:

Shreve vs. U. S., (CCA9) 77 Fed. (2nd) 2, 7.

Osborne vs. U. S., (CCA9) 17 Fed. (2nd) 246, 248.

Wilkes vs. U. S., (CCA9) 80 Fed. (2nd) 289, 290, 291, 292.

Greenbaum vs. U. S., (CCA9) 80 Fed. (2nd) 113, 121.

Chaffee vs. U. S., 18 Wall. 516, 21 L. Ed. 908.

Phillips vs. U. S., (CCA8) 201 Fed. 259.

Pabst Brewing Co. vs. E. Clemens Horst Co., (CCA9) 229 Fed. 913.

Beck vs. U. S., (CCA8) 33 Fed. (2nd) 107.

The testimony reveals that these defendants had no connection with the First National Bank of Prescott either as officer, director or employee. (Trott, R. 300, Evans, R. 324, Faulkner, R. 337). Therefore invoking the decision of this Court in *Shreve vs. U. S.*, supra, it was "essential to show that the defendants made such entries, or caused them to be made, or assented thereto." That decision was not only ignored in admitting in evidence these records of the First National Bank of Prescott, but it was flagrantly violated.

2. The foregoing records were not admissible under the act of June 20, 1936 (Sec. 695, 695h, Title 28, USCA) because that act does not apply to this case, but, if it does, then it is unconstitutional and void.[29]

Defendants at the trial took the position that, since Sec. 695, Title 28, USCA, did not become operative until June 20, 1936, it could not apply to this case, because the indictment was returned on December 23, 1933 (R. 38) approximately two years and a half before the act became operative. Besides, Sec. 695h of the act provides that Sec. 695 shall be prospective only, and not retroactive.

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29. The applicable sections of the act are set forth in the Appendix at pages 18, 19.

Defendants did not consider that, for the purpose of preserving the question, they were required to invoke the act on behalf of the Government, and then attack its constitutionality. Counsel for the Government met the objections to the admission of these exhibits in evidence sub silentio (R. 300, 309, 312, 313). Counsel for defendants thought they were not required to do more.

The act, by express terms, is inapplicable, and it has been so construed.

Valli vs. U. S., (CCA1) 94 Fed. (2nd) 687.

However, if counsel for the Government, in meeting the foregoing Assignments of Error, invoke the act now for the first time, then defendants assert that it is unconstitutional as applied to this case, and to them, because:

(a) It dispenses with the necessity of confronting defendants with the witnesses against them in violation of the Sixth Amendment to the United States Constitution.

U. S. vs. Elder, 232 Fed. 267, 268.

People vs. Vammar, 320 Ill. 287, 150 N.E. 628.

State vs. Shaw, 75 Wash, 326, 135 Pac. 20.

(b) It alters the legal rules of evidence, and requires less or different testimony to convict defendants than the law required at the time of the commission of the alleged offense, and thus the act is ex post facto in violation of Section 9, Article 1, of the United States Constitution.

Malloy vs. South Carolina, 237 U. S. 180, 59

L. Ed. 905, 35 Sup. Ct. Rep. 507.[30]

NINTH: THE TRIAL COURT ERRED IN ADMITTING TESTIMONY OF GOVERNMENT'S WITNESS SCHROEDER BASED UPON HIS AUDIT OF BOOKS AND RECORDS OF CENTURY INVESTMENT TRUST, ARIZONA HOLDING CORPORATION AND SECURITY BUILDING AND LOAN ASSOCIATION. THE WITNESS SCHROEDER TESTIFIED SAID AUDIT WAS MADE IN PART FROM BOOKS AND RECORDS OF CORPORATIONS NOT NAMED IN THE INDICTMENT, AND THE BOOKS AND RECORDS OF SAID CORPORATIONS WERE NOT IN EVIDENCE OR BEFORE THE COURT. FOR THESE REASONS THE TRIAL COURT ALSO ERRED IN REFUSING DEFENDANTS' MOTION TO STRIKE THE TESTIMONY OF THE WITNESS SCHROEDER.

ASSIGNMENTS OF ERROR

XXI

The Court erred in permitting Government's witness Schroeder to testify from, and in regard to, a summary which he made from books and records of Arizona Holding Corporation, Century Investment Trust and Security Building and Loan Association, which testimony was admitted over the following objection and exception by counsel for defendants:

"MR. PETERSON: Q. From your examination of the books of the Security Building and Loan Association now in evidence, did you determine whether or not Loan 26, known as the Rayburn Loan, is included in the figure of $193,-929.46 set out in the financial statements of the Security Building and Loan Association as of December 31st, 1931?

MR. PETERSON: And add to that, Ex-

30. This question has been ably briefed in the case of Greenbaum vs. U. S., No. 8739, now on appeal to the Court, by learned counsel for appellants, and by learned counsel appearing amici curiae. A further discussion of the question would add no advantage here. The decision of the Court in the Greenbaum case undoubtedly will provide the rule of decision to be applied in this case.

hibit No. 160, Loans secured by first mortgage on Arizona real estate.

MR. HARDY: Now, your Honor, we object to that for the reason that it has been testified by the witness that his audit is not based entirely upon the books and records of the corporations named in this indictment which have been introduced in evidence, or which are in Court, but that it has been based upon and is reflected from the examination of other records, books and documents of corporations, or from other sources which are not in evidence, or before this Court, or available.

THE COURT: That is not the witness's testimony. He said his audit is in connection with the books in evidence, and in connection with that, he made other investigations of other corporations, but his audit is based upon the books and records introduced here in evidence. The objection is overruled.

MR. HARDY: Exception.

THE WITNESS: I believe that exhibit is dated 1930, rather than 1931.

MR. PETERSON: December 31st, 1930?

A. Yes, Loan 26 is included.

Q. And from your examination of the books in evidence, can you determine whether or not Loan No. 37, known as the A. Y. York loan is included in the figure of $193,929.46 set out in Exhibit 160 in evidence, in the amount of loans secured by first mortgages on Arizona real estate?

MR. HARDY: Your Honor, for the purpose of the record, may we have the same objection

to all this testimony without the necessity of repeating it?

THE COURT: Oh, yes.

MR. HARDY: And I understand that we have an exception to the ruling of the Court?

THE COURT: All right.

THE WITNESS: It is." (R. 938).

XXII

The Court erred in refusing to strike the testimony on direct examination of Government's witness Schroeder, based upon a summary of books and records of Century Investment Trust, Arizona Holding Corporation and Security Building and Loan Association, for the following reasons urged at the close of the direct examination of said witness:

"MR. HARDY: Now, may it please your Honor, I desire to make a motion to strike all of the testimony of the witness Shroeder based upon his testimony and his audit generally, for the reason that it now appears that his audit is made with respect to the transactions about which he testified upon the records of corporations not named in the indictment, and upon records of corporations which are neither in evidence nor before this Court.

THE COURT: The motion is denied.

MR. HARDY: Exception." (R. 940).

The witness Schroeder was an auditor also employed as a special agent for the Federal Bureau of Investigation (R. 654). He made an audit of the books of Security Building and Loan Association,

Century Investment Trust and Arizona Holding Corporation (R. 655). Defendants contend that the testimony of the witness himself discloses he did not confine his audit to those books, but utilized books and records of other corporations not named in the indictment, or bill of particulars, and other books and records neither in evidence nor before the court. Unless his testimony, based upon such audit, was confined to books and records of Arizona Holding Corporation, Century Investment Trust and Security Building and Loan Association, then his testimony was inadmissible under the objection made thereto by defendants (R. 658, 659) following the decisions of this Court in the following cases:

Wilkes vs. U. S., (CCA9) 80 Fed. (2nd) 285.

Greenbaum vs. U. S., (CCA9) 80 Fed. (2nd) 113.

Osborne vs. U. S., (CCA9) 17 Fed. (2nd) 246.

Pabst Brewing Co. vs. E. Clemens Horst Co., (CCA9) 229 Fed. 913.

At the time the objection was made to the admission of this testimony, the trial court made the following observation:

> "That is not the witness's testimony. He said his audit is in connection with books in evidence, *and in connection with that, he made other investigations of other corporations*, but his audit is based upon the books and records introduced here in evidence." (R. 658).

The witness, on voir dire examination, testified in full substance as follows:

> "I stated I made an examination of the books of the Security Building and Loan Association, Century Investment Trust and Arizona Holding Corporation, for the purpose of making an audit

of those books. The books of those companies which I examined are here in Court. The numbers of the exhibits which I examined are 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 77, 78, 79, 80, 107 to 107-R, 108, 109, 110, 111 to 111-d, 112, 113, 126, 127, 185, 186, 187 and 189 to 202 inclusive, 203, 204. The numbers I have read are solely the records of the Arizona Holding Corporation, the Century Investment Trust and the Security Building and Loan Association. *They are not all the records which I have examined in connection with my audit.* There are a great quantity of records which I have examined that are not in the court room and not in evidence. They are records of the Overland Hotel Company, public records of Pima County, Maricopa County, Yavapai County, records of the First National Bank of Prescott, records of various banks in the southern part of California and Arizona, some of which records are here in evidence, *some of which are not,* and *some of which are not in the court room.* I also examined records in Yuma County. I made an examination of the records of banks in which these various companies had bank accounts; Southwest Bank and Trust Company, either in Phoenix or Tucson; the First National Bank of Prescott. I believe all the records of the First National Bank of Prescott are here except certain correspondence files and things of that sort. I did make an examination of the correspondence files of the First National Bank of Prescott. I seem to recall having been at some bank in California, I can't just name it now. I don't remember making an examination of the records of the California Savings and Commercial Bank in San Diego, California. I believe I did

make an examination of a bank in San Diego in connection with this case. As far as the Arizona Holding Corporation and the Century Investment Trust are concerned, the books here in court are the only ones I have ever seen of those companies. Now, so far as the *Security Building and Loan Association is concerned*, there are large binders with *thousands of sheets of pass book holders' accounts and books of that nature that are not here in the court room, which I examined in connection with this case and from which I made my audit.*" (R. 655, 656).

Again the witness testified:

"*I worked upon the records of the Commercial National Bank in Phoenix in connection with the audit I prepared in this case. I could not say specifically in connection with which loans, probably in connection with some of the loans which I have testified to today.* I haven't the notes which I made from the records of the Commercial National Bank. I don't know where they are." (R. 683, 684).

Again the witness testified, on re-direct examination:

"In so far as matters that I testified to *on direct examination* was based upon my audit which I made, and that audit was made solely from books and records in evidence in this case." (R. 687).

And again, on re-cross examination:

"On cross examination I think mention was made of some other items, but they were not offered, no reference was made to them. Records of the First National Bank of Prescott and the First National Bank of Phoenix and the Over-

land Hotel and Investment Company were mentioned but no reference was made to them. I mentioned I examined them. Records of the First National Bank of Prescott are in evidence and in connection with the audit which I made." (R. 688).

In the latter part of the witness's testimony, as quoted above, we think this Court will observe that the witness sensed the predicament into which he had led the Government. Before the testimony was admitted over the objection made, its competency should have been more assuring than the record discloses.

TENTH: THE TRIAL COURT ERRED IN ADMITTING IN EVIDENCE A MORTGAGE EXECUTED BY WM. H. PERRY TO YAVAPAI COUNTY SAVINGS BANK BECAUSE IT IS A TRANSACTION BETWEEN PARTIES NOT NAMED IN THE INDICTMENT; NO FOUNDATION WAS LAID FOR ITS ADMISSION; AND IT IS HEARSAY. THE TRIAL COURT ALSO ERRED IN ADMITTING IN EVIDENCE A SHERIFF'S DEED EXECUTED TO SAID BANK FOLLOWING THE FORECLOSURE OF SAID MORTGAGE, BECAUSE NO FOUNDATION WAS LAID FOR ITS ADMISSION, AND, FURTHER BECAUSE THE PRELIMINARY PROCEEDINGS LEADING UP TO THE EXECUTION OF SAID SHERIFF'S DEED WERE NOT IN EVIDENCE, AND SUCH PROCEEDINGS WERE THE BEST EVIDENCE TO SUPPORT THE ADMISSION OF SAID SHERIFF'S DEED IN EVIDENCE.

ASSIGNMENTS OF ERROR

XXVI

The Court erred in admitting in evidence Government's Exhibit 170, which was received in evidence over the following objection and exception by counsel for defendants:

"MR. HARDY: Your Honor, we object to the introduction of Government's Exhibit 170 as identified here by Mr. Russell, for the reason it

appears to be a mortgage executed from a person by the name of Perry, to the Yavapai County Savings Bank, a corporation, which is not a corporation named in the indictment herein, and for the reason that it appears to be immaterial and has no bearing upon the issues in this case. It is a hearsay transaction in so far as those defendants are concerned; no proper foundation has been laid for its admission.

THE COURT: Overruled.

MR. HARDY: Exception."

The full substance of said exhibit is as follows: Original mortgage executed April 16, 1930, by Wm. H. Perry, a widower, mortgaging to Yavapai County Savings Bank, a corporation, real estate situated in Yavapai County, Arizona, described as all that certain real estate and property particularly described as follows: All that portion of the Southwest Quarter of the Northwest Quarter of Section Thirty-three (33) in T. Fourteen (14), North of Range Two (2) West of the Gila and Salt River Base and Meridian, in Yavapai County, Arizona, bounded and described as follows: Beginning at the West quarter corner of said Section 33, above Township and Range, thence North 0° 08′ W. 258.0 feet; thence N. 89° 20′ E. 202.3 feet to a stake which is the actual point of beginning; then S. 75° 17′ E. 196.3 feet to an iron pin; thence No. 12° 09′ E. 51.4 feet to a cross on a rock; thence N. 18° 42′ E. 56.4 feet to a cross on a rock; thence N. 36° 36′ W. 56.4 feet to an iron pin marking the Northeast corner of said premises; thence N. 83° 34′ W. 173.4 feet to the Northwest corner of said premises; thence S. 09° 41′ W. 60 feet to an iron pin; thence S. 02° 47′ W. 60 feet to the point of beginning. Acknowledged same date before

R. O. Barrett, Notary Public Yavapai County, Arizona; secures payment of promissory note of even date of mortgage in the sum of $2500.00; recorded at request of Guarantee Title & Tr. Co., April 16, 1930, with the County Recorder of Yavapai County, Arizona. (R. 946).

XXVII

The Court erred in admitting in evidence Government's Exhibit 172, which was received in evidence over the following objection and exception by counsel for defendants:

> "MR. HARDY: We object to its receipt in evidence, your Honor, upon the grounds that no foundation has been laid for its admission, and the preliminary proceedings leading up to the execution of this Sheriff's deed are not in evidence, and they are the best evidence in order to support the admission of this document.
>
> THE COURT: Overruled.
>
> MR. HARDY: Exception."

The full substance of said exhibit is as follows: Sheriff's deed dated May 3, 1930, executed by George C. Ruffner, Sheriff of Yavapai County, Arizona, conveying to Yavapai County Savings Bank, a corporation, property situated in Yavapai County, Arizona, described in Government's Exhibit 170; deed executed in consideration of $2750.00 paid by Yavapai County Savings Bank to said Sheriff under certificate of sale on foreclosure covering said premises; recorded at request of Favour & Baker, May 3, 1935, Book 158 of Deeds, page 234, records of Yavapai County, Arizona (R. 947).

Assignment of Error XXVI. This Assignment of Error pertains to the admission in evidence of Government's Exhibit 170, which is a mortgage executed by Wm. H. Perry to Yavapai County Savings Bank. The mortgage was identified by Government's witness Russell who was the secretary of Yavapai County Savings Bank (R. 547). The property described in the mortgage is the same property described in a deed executed by Dean B. Blackburn to Arizona Holding Corporation, embraced by Government's Exhibit 144 (R. 517). Blackburn did not testify. The exemplified copy of the deed executed by Blackburn was received in evidence, over the objection of defendants, without further proof than exemplification (R. 516, 517, 518). The Blackburn deed, therefore, falls within the objection made to its admissibility, which were made to instruments of the same import, heretofore discussed in Assignment of Error XIII, IX, X and XII. Manifestly, the Perry mortgage (Government's Exhibit 170) was introduced in evidence for the purpose of showing that, whereas Blackburn deeded the property to Arizona Holding Corporation, the property was, in fact, owned by Perry, who mortgaged it to Yavapai County Savings Bank. Obviously, the Perry mortgage was not admissable, because Perry was not called to testify with respect thereto, and no competent proof was offered to show that Perry owned the property described in his mortgage, or that Blackburn himself did not own the property.

The effect of the evidence is this: Since Blackburn conveyed to Arizona Holding Corporation identical property conveyed by Perry to Yavapai County Savings Bank, then Blackburn could not have owned the property which he conveyed. Neither Blackburn, nor Perry, testified they owned the property. The

only evidence of ownership by Perry is the inference arising from the evidence that a party by that name mortgaged the property to Yavapai County Savings Bank.

With this state of the record, therefore, the objection that the Perry mortgage was hearsay, and that no proper foundation had been laid for its admission, was sound (R. 547, 548).

22 C. J. p. 974, Sec. 1220.

Assignment of Error XXVII. This Assignment of Error relates to the admission in evidence of Government's Exhibit 172 (R. 551, 552) which is a sheriff's deed presumably issued after the sale under the judgement foreclosing the Perry mortgage referred to in the foregoing Assignment of Error XXVI.

The trial court admitted in evidence the sheriff's deed over the objection that no foundation had been laid for its admission; that the preliminary proceedings leading up to the execution of the sheriff's deed were not in evidence; and that such proceedings were the best evidence to support the admission of the sheriff's deed (R. 551).

Neither of these defendants, nor the corporations named in the indictment, were parties to the proceedings foreclosing the mortgage. And, again, Yavapai County Savings Bank, the grantee under the sheriff's deed, was not mentioned in the bill of particulars, which was the ground of another objection (R. 550).

We are at a loss to understand upon what theory counsel for the Government offered this sheriff's deed, or upon what rule of law the trial court relied to permit of its admission in evidence, in view of

the state of the record and the objections made to it. Unquestionably, before the sheriff's deed was admissible at all, the preliminary foreclosure proceedings should have been first proved, as was raised by the objection, because otherwise no foundation whatever was laid to permit the sheriff's deed to be received in evidence. 34 C. J. p. 1067, Sec. 1508.

The rule of evidence violated here is one of immemorial recognition. It is stated, in common with other courts, by the Supreme Court of Arizona, in the case of *Mutual Benefit Health & Accident Ass'n vs. Neale*, 43 Ariz. 532, 546, 33 Pac. (2nd) 604, 610, as follows:

> "As a matter of common law, it has long been the rule that a judgment in personam, as against any person who is a stranger to the cause, is evidence only of the fact of its own rendition, *and may not be introduced to establish the facts upon which it has been rendered.* (Citing authorities). And the test of whether a person is a stranger is whether he was interested in the subject-matter of the proceeding, with the right to make defense, to adduce testimony, to cross-examine the witnesses on the opposite side, to control in some degree the proceeding, and to appeal from the judgment. (Citing authorities." (Italics supplied).

Since the judgment was not admissible in evidence against these defendants, then the sheriff's deed, following the judgment, for more cogent reasons was inadmissible. Here we simply have the sheriff's deed. The preliminary proceedings authorizing it are not in evidence,—not even the judgment. In fact, the trial court gave the sheriff's deed more approba-

tion than the law gives judgments as between strangers to them. For illustration:

> "A judgment is not admissible in evidence against a person who was not a party, nor in privity with a party, to the suit wherein it was rendered, or at least it is not admissible against him as evidence of the facts which it adjudicates or determines or on which it is based, and which are in issue in the subsequent action, unless the judgment or decree is in rem, although it may be evidence of certain other matters. Certainly, as against a person who is not a party to the action, nor in privity with a party, a judgment is not conclusive evidence of the facts determinded thereby. Some courts hold that, although a judgment may not be binding or conclusive on a third person, nevertheless it may be competent against him to prove prima facie the facts recited therein; but other courts hold that if, by reason of lack of identity of parties, it is not conclusive of the questions of fact involved therein, it is not even a circumstance which the jury may consider on that point." 34 C. J. p. 1050, Sec. 1484.

See also 34 C. J. p. 1043, Sec. 1480.

The harm is obvious, since the Perry mortgage struck directly at the bona fides of the Blackburn deed.

ELEVENTH: THE TRIAL COURT ERRED IN ADMITTING TESTIMONY OF GOVERNMENT'S WITNESS YORK CONCERNING COMMUNICATIONS BETWEEN THE WITNESS AND HIS DAUGHTER RELATING TO TRANSACTIONS ON BEHALF OF ONE OF THE CORPORATIONS NAMED IN THE INDICTMENT, BECAUSE THE TESTIMONY WAS HEARSAY. FOR THIS REASON

THE TRIAL COURT ALSO ERRED IN REFUSING DEFENDANT'S MOTION TO STRIKE THE TESTIMONY.

ASSIGNMENT OF ERROR

XXVIII

The Court erred in admitting the testimony of Government's witness A. W. York, which was admitted over the following objection and exception by counsel for defendants:

THE WITNESS: "Q. Did you, on or about the 20th day, about the month of December, 1930, mortgage any property in Navajo County, Arizona, to the Security Building and Loan Association? A. I signed a mortgage, yes, sir. Q. And where did you sign that mortgage? A. Oakland. Q. In Oakland? A. Yes, sir. Q. How did you happen to sign that mortgage?

MR. HARDY: Now, your Honor, we object to the answer to that question, because no connection has been shown that would justify an answer by the witness to that question, and for the further reason that up to that time no proper foundation has been laid with respect to any testimony with respect to the mortgage.

THE COURT: Go ahead, read it.

MR. HARDY: Exception.

THE WITNESS: A. My daughter wrote me— Mr. Crouch: We did not hear. The witness: My daughter wrote me that the Company she had been connected with had a proposition for me and wanted me to sign some papers.

MR. HARDY: Now, your Honor, we move that that answer be stricken, because it is hear-

say testimony as to these defendants, a letter from his daughter to him.

THE COURT: It may stand. Go ahead.

MR. HARDY: Exception.

THE WITNESS: My daughter wrote me saying that the Company that her husband was conected with had a proposition for me in Arizona and that they had something for me to sign, the purpose, as I later on understood, was for me to come over here and take charge of a ranch in the vicinity of Holbrook." (R. 948).

The witness York testified on behalf of the Government at the former trial of this case, but died before this retrial of the case (R. 558). His testimony given at the former trial was read by Government's witness Walker, who reported the tstimony on the first trial (R. 558). York and his wife executed a mortgage to Security Building and Loan Association on property therein described, an exemplified copy of which was received in evidence as Government's Exhibit 175 (R. 562). (This is also one of the instruments referred to in Assignments of Error VIII, IX, X, XI, and XII.) Over the objection of defendants, the witness York testified his daughter wrote him that the company she had been connected with had a "proposition" for him to sign some papers (R. 560, 561). He did sign the mortgage referred to, which was delivered to Security Building and Loan Association (R. 562). The witness York was the father-in-law of defendant Perkins, who, as we have seen, testified as a witness on behalf of the Government (R. 558). No testimony was given that either of these defendants prompted Perkins' wife to write

her father concerning this transaction, or that they even knew about it. Accordingly, in a most flagrant aspect, testimony of the witness York concerning communications between his daughter and him was hearsay. The mortgage which the witness York, and his wife, signed, embraced lands owned by John McLaws and Nellie McLaws, which the witness York testified he did not purchase from them (R. 559, 560). (Compare Government's Exhibit 175 (R. 562) and Government's Exhibit 178 (R. 567). The mortgage was also signed by Fannie York, wife of the witness York, but she did not testify, and further objection was made to the admission of the mortgage in evidence on that ground (R. 562).

The error of this hearsay testimony is so obvious that we hesitate to burden the Court with argument on it. Communications between the witness York and his daughter, without proof that they were prompted by these defendants, or that they knew about them, totally ignored the rule against hearsay evidence.

Having heard the testimony, it should then, at least, have become evident that it was hearsay. Hence, the trial court should have granted defendants' motion to strike it (R. 560, 561).

If, as often seems peculiar to mail fraud cases, defendants are to be stripped of the protection which fundamental rules of evidence accord them, then the time is opportune, it seems to us, for this Court to emphasize that convictions following such methods will be corrected to the end that procedure under salutary standards of law may be preserved. A similar circumstance prompted this Court to reverse the judgments on the former appeal.

Shreve vs. U. S., 77 Fed. (2nd) 2, 5.

TWELFTH: THE TRIAL COURT ERRED IN REFUSING TO PERMIT DEFENDANTS' WITNESS CRANE, A CERTIFIED PUBLIC ACCOUNTANT, TO TESTIFY THAT PRACTICES OF ACCOUNTING INDULGED IN BETWEEN CENTURY INVESTMENT TRUST AND SECURITY BUILDING AND LOAN ASSOCIATION, AS RELATED BY GOVERNMENT'S WITNESS FIERSTONE, WERE IN ACCORD WITH ACCEPTED ACCOUNTING PRINCIPLES.

ASSIGNMENT OF ERROR

XXIX

The Court erred in refusing to permit defendants' witness Crane to testify, on direct examination, over the following objection by counsel for the Government, and exception by counsel for the defendants, as follows:

"Q. Is it in accordance with the accepted accounting principles for a holding company to absorb a charge to the cost of this investment in a subsidiary corporate company, proportions of the expense of the operation of a subsidiary?

MR. FLYNN: Object to that on the ground it is invading the province of the jury and calling for a conclusion and opinion.

MR. HARDY: He is an expert, your Honor, and I asked him about the accepted practice of accounting.

THE COURT: Oh, well, let the jury determine that.

MR. HARDY: Exception, please. With respect to this character of accounting as between a holding company and its subsidiary, can you state, as a Certified Public Accountant, whether

that manner of accounting between the holding company and a subsidiary is approved by the Internal Revenue Bureau of the United States Government?

MR. FLYNN: Object to that on the ground it is immaterial and that it does not tend to prove or disprove any of the issues in this case, and calling for a conclusion and opinion of the witness and invading the province of the jury.

THE COURT: Sustained.

MR. HARDY: Exception." (R. 950).

Government's witness Fierstone, as we have seen, audited the books of Century Investment Trust and testified from that audit (R. 694, 695). During the giving of testimony, he referred to expense items of Security Building and Loan Association which were paid by Century Investment Trust. The full substance of his testimony in this respect is as follows:

"Well, on December 31st, 1929, the Tucson office of the Building and Loan Association had a loss of $1,513.65, which was assumed by the Century Investment Trust and added to the cost of this stock. On October 31st, 1930, the Century Investment Trust had spent $17,552.39 as expenses or advances to the Security Building and Loan Association during the preceding year, so that sum was added to the cost of the stock, and on October 31st, 1931, the sum of $20,391.46 was also added to the valuation of that stock, representing sums paid out as expenses and advances to the Security Building and Loan Association

during the preceding year. Those several additions, plus the original cost, add up to $99,457.50. The Century Investment Trust had been in business, as evidenced by the books of the company on December 31st, 1929, two months." (R. 705).

On cross examination the witness Fierstone further testified as follows:

"I stated that there is carried forward on the Century Investment Trust books an account called 'Security Building and Loan Association expenses' amounting to $21,868.88. The breakdown on that figure is: the books of the Century Investment Trust carried an account known as 408, or 101, labelled 'Security Building and Loan, Phoenix, Expense.' For the twelve months ending October 31st, 1930, the balance in that account was $16,933.23. Of that amount $303.79 occurred in November and December, 1929. Now, the same account in November and December, 1930, is reflected $5,239.44. By taking out the two months of November and December of 1929, and adding the two months of November and December, 1930, would give you a figure for the twelve calendar months of January to December, 1930, amounting to $21,868.88. I didn't make any allocation of the several items of the salary account for that period. The salaries comprises a substantial part of it. The salaries of D. H. Shreve, G. O. Perkins, R. F. Watt and E. F. Young, and I believe M. Gondie. There is nothing set up there at all for J. H. Shreve or A. C. Shreve. There is nothing in the books to show who the people I have named were working for. I don't know whether they were working for both the Century Investment Trust and the Security

Building and Loan Association. But those salaries are charged in that account and added to the cost of the stock of the Security Building and Loan Association, which was carried on the books of the Century Investment Trust. Whether it is unusual depends upon your method of bookkeeping. Some people add the expense of the company to the cost of stock. It would all depend upon other circumstances, and you can't lay down a general rule on that. Some public utilities companies do it to a certain extent. I have never done any income tax work so I don't know anything about the permissible practice for the Income Tax Bureau and other agencies of the Government." (R. 717, 718).

Defendants' witness Crane, referred to in the foregoing Assignment of Error, was a certified public accountant (R. 830). He had made an audit of the boks of Security Building and Loan Association from its inception to November 14, 1931, at the direction of the Superior Court of Maricopa County, Arizona, in receivership proceedings (R. 830). Defendants sought to have the witness Crane testify, as an expert, upon the question of approved accounting practices with respect to Century Investment Trust, as a holding corporation, in absorbing expenses of its subsidiary, Security Building and Loan Association. The witness Crane had testified, in full substance, as follows:

"I heard the testimony of Mr. Fierstone to the effect that during the period of December 31st, 1930, certain items of expense in connection with the operation of the Security Building and Loan Association were paid or obsorbed by the Century Investment Trust." (R. 834).

Thereupon he was asked, as shown by the foregoing Assignment of Error, the following questions by counsel for defendants:

"Q. Is it in accordance with the accepted accounting principles for a holding company to absorb a charge to the cost of this investment in a subsidiary corporate company, proportions of the expense of the operation of a subsidiary?

MR. FLYNN: Object to that on the ground it is invading the province of the jury and calling for a conclusion and opinion.

MR. HARDY: He is an expert, your Honor, and I asked him about the accepted practice of accounting.

THE COURT: Oh, well, let the jury determine that.

MR. HARDY: Exception, please. With respect to this character of accounting as between a holding company and its subsidiary, can you state, as a Certified Public Accountant, whether that manner of accounting between the holding company and a subsidiary is approved by the Internal Revenue Bureau of the United States Government? (R. 834).

The United States Attorney objected on the ground the question was immaterial; that it did not tend to prove or disprove any issues in the case; that it called for a conclusion and opinion of the witness; and invaded the province of the jury (R. 835). The court

sustained the objection and defendants excepted (R. 835).

Previously the court, as we have shown, refused to permit defendant Archie C. Shreve to testify with respect to conversations between Government's witnesses Perkins and Hobbs, about which they had testified.[31] In giving their defense, that was discouraging enough, but now the trial court refused to permit defendants' witness Crane to give his expert opinion with regard to accounting methods about which Government's auditor Fierstone had previously testified. The advantage was all on the side of the Government. The trial judge disposed of defendants' contention by remarking, "Oh, well, let the jury determine that". (R. 834). All the jury had before them upon which to determine the question was the one-sided testimony of Government's witness Fierstone.

The case of *Rowe vs. Whatcom County Ry. & Light Co.*, 44 Wash. 658, 87 Pac. 921, confirms the error. The action was for damages for personal injuries. Physicians called by defendant testified to the character of plaintiff's injuries and the tests applied to determine it. The trial judge refused to permit the physician called by plaintiff to give testimony in contradiction of the physicians called by defendant, because he thought, as the trial judge thought here, the question was for the jury. The Supreme Court of Washington held this was error. The case should be accepted as a satisfactory precedent by this Court, because by coincidence the opinion was written by Judge Rudkin while sitting as a

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31. Assignments of Error III, IV, V, VI, and XXXV, supra.

member of the Supreme Court of Washington, and the trial in the lower court was presided over by Judge Neterer. Judge Rudkin, then speaking for the Supreme Court of Washington (87 Pac. 922) said:

> "The reason assigned by the court for its ruling was that the question whether the tests applied by the witnesses for the respondents were fair or proper was for the jury. In this the court erred. The witness was asked his opinion on a matter involving scientfic and technical knowledge, not within the experience of the ordinary witness or juror, and should have been permitted to answer * * *".

Upon the question generally see: 22 C. J. p. 737, Sec. 827.

THIRTEENTH: THE TRIAL COURT ERRED IN CHARGING THE JURY WITH RESPECT TO DENFENDANS' CONNECTION WITH THE SCHEMES ALLEGED IN THE INDICTMENT; AND THE TRIAL COURT ALSO ERRED IN REFUSING TO INSTRUCT THE JURY WITH RESPECT TO THE FAILURE OF PROOF CONCERNING THE ALLEGATION IN THE INDICTMENT THAT DEFENDANTS FALSELY REPRESENTED THAT SECURITY BUILDING AND LOAN ASSOCIATION HAD A PAID-IN CAPITAL STOCK OF $300,000.00.

ASSIGNMENT OF ERROR

XXXII

The Court erred in charging the jury as follows:

"On the question of the birth of the alleged schemes, all the Government need to prove is that that happened when fraud of the character denounced by the indictment was first consciously and intentionally practiced by one or more of the parties

charged therewith. If it may have been only a development consciously brought into action out of a scheme in its origin legitimate and honestly intentioned, proof of that fact, convincing beyond a reasonable doubt would be sufficient, and if you are convinced beyond a reasonable doubt that these defendants, or either of them, were at any of the times a party to a scheme to defraud, as charged in the indictment, a withdrawal from such scheme could not be effected by intent alone. There must have been some affirmative action on the part of the defendants to effect such withdrawal." (R. 953).

Defendants excepted to the foregoing charge for the reason that the Court did not define to the jury what would constitute an affirmative act (R. 896).

XXXIII

The Court erred in refusing to include in its charge defendants' requested instruction number 43, which is as follows:

> "You are instructed that there has been no evidence introduced or received in this case that the defendants, or either of them, made or caused to be made any representations that the Security Building and Loan Association had a paid-in capital stock of $300,000.00, as alleged in the indictment." (R. 954).

Assignment of Error XXXII. Under the indictment allegations, the alleged schemes had their birth upon the organization of Arizona Holding Corporation, Century Investment Trust and Security Build-

ing and Loan Association. The issue was raised not only to defendants' participation in the schemes, but also with respect to their withdrawal from participation in the management of the last named corporations. The defendant Archie C. Shreve testified that when their brother, Daniel H. Shreve, came to Phoenix, the latter took control and management of the corporations. (R. 769, 770). His testimony is supported by the testimony of Government witness Hobbs (R. 403, 404, 580, 581). Undoubtedly, this testimony prompted the trial court to give the instruction embraced in the foregoing Assignment of Error XXXII.

Upon the question of withdrawal from the schemes, the court charged the jury that it could not be effected by intent alone, but that the withdrawal must have been manifested by some "affirmative action" on the part of the defendants "to effect such withdrawal." (R. 868). Defendants excepted to the charge because the court did not define what would constitute an affirmative act which would effect the withdrawal. (R. 896). Were these acts manifested by formal resignations from the officerships and boards of directors of these corporations, or by the formal action of the boards of directors accepting such resignations, or by operation of law, or how? Judge Wilbur, when speaking for the Supreme Court of California in *Young vs. Southern Pacific Co.*, 182 Cal. 369, 190 Pac. 36, 41, in commenting upon the failure of the trial court to define in an instruction the term "proper warning" in its application to negligence, said:

> "Aside from the proposition that this instruction submitted to the jury, without any standard

for the determination of the same, the question of what constituted 'proper warning' of the danger of the approaching train, the instruction was objectionable because the complaint did not allege the failure to have a flagman at the crossing as a basis of the claim of negligence. The instruction should not have been given."

The court should always explain the meaning of legal or technical terms occurring in its instructions.

64 C. J. p. 617, Sec. 556.

Buckeye Cotton Oil Co. vs. Sloan (CCA6) 250

Fed. 712, 725, 726.

Assignment of Error XXXIII. The indicement alleges that defendants falsely represented that $300,000.00 of the capital stock of Security Building and Loan Association had been paid in, whereas the paid-in capital stock did not exceed $45,000.00. (R. 5, 6). Not one syllable of evidence was introduced by the Government to prove that allegation. Therefore, defendants requested the trial court to instruct the jury (requested instruction No. 43) that no evidence had been received that defendants caused such representation to be made. (R. 898). The trial court refused to give the requested instruction (R. 895).[32]

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32. It should be said that, whereas defendants actually excepted to the refusal of the trial court to give this instruction, the exception does not appear in the bill of exceptions. The trial court designated defendants' requested instructions which were refused (R. 894) and the reporter's transcript of the testimony discloses that defendants made the following exception:

"MR. HARDY: May we have an exception, your Honor, to those instructions requested by the defendants which were

Assuming this Court will consider the error assigned, it seems sufficient to say that, since the record does not disclose any proof whatever of this indictment allegation, it was clearly erroneous for the court to refuse the requested instruction.

FOURTEENTH: THE COURT ERRED IN DENYING DEFENDANTS' MOTION FOR AN INSTRUCTED VERDICT BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT THESE DEFENDANTS USED THE MAILS TO EXECUTE THE SCHEMES, OR ANY OF THEM, ALLEGED IN THE INDICTMENT.

ASSIGNMENT OF ERROR

XXXIV

The Court erred in denying defendants' motion for an instructed verdict made at the close of the Government's case, and at the close of the whole case, for the reason that the evidence was insufficient to prove the offenses charged, for the following reasons:

1. The evidence was insufficient to prove the commission by said defendants, or either of them, of the alleged offenses charged in the indictment.

2. The evidence was insufficient to prove that said defendants, or either of them, placed or caused to be placed in the United States Post Office for the District of Arizona, the letters and printed matter set forth in the indictment.

3. The evidence was insufficient to show or prove

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refused or not given by your Honor, and may that exception go to each of those which were refused separately?"

We appreciate the rule that, in order for claimed error to be reviewable, the exception to it must be embodied in the bill of exceptions (O'Brien, Manual of Federal Appellate Procedure, p 20) but this Court may notice the error, although the exception does not appear in the record. Id. p. 21.

that said defendants, or either of them, did, or could, by the mailing of the letters or printed matter received in evidence, execute the schemes or artifices set forth in the indictment (R. 954).

At the close of the Government's case, defendants presented a written motion for an instructed verdict directed to each count of the indictment (R. 730). The motion was comprehensive (R. 101, 121) but only that part of it which relates to the sufficiency of the evidence to connect these defendants with mailing the indictment letters is now invoked. Although separately stated, the grounds of the motion were the same as to each count (R. 730, 101). At the close of the whole case, the motion was again presented. (R. 849). The trial court denied the motion, and defendants excepted. (R. 732, 849).

Section 338, Title 18, USCA, confers jurisdiction upon federal courts to try the offense there denounced only when the United States Mails are used for the purpose of executing a fraudulent scheme. The scheme may be ever so wicked, but, unless the mails are used, the Federal courts have nothing to do with it.

The question is not raised that the indictment letters were not mailed by someone, or that they were not received by the persons named in the indictment. Defendants' position is that the evidence does not disclose they had anything to do with mailing the letters.

The receipt of the indictment letters through the mails by the addresses named therein is no proof that these defendants, or either of them, mailed them. As was said in *Freeman vs. United States* (CCA3) 20 Fed. (2d) 748, 750:

"The basic element of the offense is the placing of a letter in the United States mail for the purpose of executing such a scheme. That is what makes it a federal offense. It is defined in the statute, must be alleged in the indictment, and must be proved. How? The Government says that is may be proved by the presumption arising from the postmark, * * * or, under the general rule that a postmark is prima facie evidence that the envelope had been mailed, * * * That, concededly, is the rule in civil cases; but it leaves unanswered the question—, vital in criminal cases—*who mailed it?*"

Again, it is said in *Beck vs. United States* (CCA8) 33 Fed. (2d) 107, 111:

"That the mails were used is clear. That the defendant Beck is bound if Barrett used the mails in the ordinary course is not open to serious dispute. The law does not now require an intent to use the mails as part of the scheme, as formerly. It is sufficient if they are used. Beck placed Barrett in the position of general manager of the corporation, leaving to him the direct management of the business while Beck primarily looked after his own business. Beck employed and paid stenographers, which shows a contemplated use of the mails. *Aside from the fact that the letters purport to bear Barrett's signature, the record is barren of proof that he signed them or mailed them. This is insufficient to bind either Barrett or Beck.*" (Italics supplied).

The indictment letters received in evidence, and the proof of their mailing, disclose that not one of

them was signed or mailed by either defendant. If there could be any doubt with respect to this statement, it is entirely dissipated by the frank, but accurate, statement of the United States Attorney during an objection made by him to testimony of defendant Archie C. Shreve, concerning the letters, when he interposed the following significant objection:

> "Q. (propounded to defendant Archie C. Shreve by his counsel): Were any of those exhibits, to your knowledge, prepared in San Diego, California?
>
> A. They were not.
>
> Q. Were any of them ever prepared, or was the preparation or the supervision of any of them done in San Diego, California?
>
> MR. FLYNN: Just a minute, we object to that on the ground that no foundation has been laid, *has not been shown he had knowledge of where or how or who prepared them, or who didn't prepare them, therefore, his testimony is incompetent.*
>
> THE COURT: Yes; he doesn't know where they were prepared (R. 794, 795, 796).

Coming, as it does, from the United States Attorney, this statement in itself demonstrates the error assigned. While the factual aspect of the objection related to defendant Archie C. Shreve only, it applies with equal force to defendant Jesse H. Shreve, because the condition of the record in this respect, as to both defendants, is identical. It is incredible

that one could mail a letter with criminal intent who did not know how, or who prepared it, or who didn't prepare it, as said by the United States Attorney.

Let us fortify the statement of the United States Attorney by the record. Government's witnesses Hobbs, Watt, Shumway and Perkins gave the only testimony relating to the *mailing* of these letters. Their testimony is important, and, in order that it may be conveniently marshalled, it is set forth in the Appendix to this brief beginning at page 30.

The testimony adverted to, and which we have set out in the Appendix to this brief, constitutes the case for the Government insofar as the mailing of the indictment letters is concerned.[34] When analysed it shows this:

(a) Neither of these defendants signed, or personally mailed the letters.

(b) It was a business custom to mail the letters.

(c) The letters were mailed in the general or regular course of business.

A business custom may be sufficient to establish the mailing of the letters, but the evidence must show, as was said in *Freeman vs. U. S.*, (CCA3) 20 Fed. (2nd) 748, 750, that it was a "business custom of *defendants*." The Government has not shown that by the evidence. True, circumstantial evidence of

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34. The defendant Archie C. Shreve testified: "I never heard of any of these letters or knew anything about them, or had anything to do with them in any manner whatsoever. The first time I knew about them was at the inception of this lawsuit when the indictment was returned. They might have been set forth in the other indictment." (R. 796).

mailing is sufficient, which might comprehend mailing "in the general or regular course of business." But those circumstances must comprise acts or facts directly attributable to these defendants. *Freeman vs. U. S.*, supra. In the case of *Greenbaum vs. U. S.*, 80 Fed. (2nd) 113, 125, circumstantial facts of mailing the indictment letter were held sufficient to bind the defendants Greenbaum, but the opinion significantly states that the letter there involved was mailed by the "admitted secretary and agent of the Greenbaums."

There is no direct evidence that these defendants mailed the indictment letters. If it is suggested that there are circumstances of their mailing them, then it should be said that, since the use of the mails is the sine qua non of the crimes charged, then circumstantial evidence of mailing should be proved *beyond a reasonable doubt.* The circumstances established fall far short of proving, beyond a reasonable doubt, that these defendants mailed the letters.

Whatever may be the rule elsewhere (16 C. J. Sec. 1571, p. 766) the Federal courts hold that all circumstantial facts essential to conviction must be proved beyond a reasonable doubt. The Circuit Court of Appeals for the First Circuit, in *Roukous vs. U. S.*, 195 Fed. 353, states the rule as follows:

> "Therefore, remembering that, while it is not necessary that any particular circumstance should of itself be sufficient to prove a criminal case beyond a reasonable doubt, yet it is necessary that each circumstance offered as a part of the combination of proofs should itself be maintained beyond a reasonable doubt, and should have some

efficiency, so far as it has efficiency to a greater or less range, beyond a reasonable doubt, and at least be free from the condition of being as consistent with innocence as with guilt, * * *"

The case here fits squarely into the pattern of the foregoing decision.

In reversing the District Court for the District of Arizona, in the case of *Paddock vs. U. S.*, 79 Fed. (2d) 872, 875, 876, this Court, speaking through Judge Wilbur with regard to an instruction dealing with the probative effect of circumstantial evidence in a fraud case, said:

"The rule with reference to the consideration of circumstantial evidence by the jury is thoroughly settled. This rule in brief is that the circumstances shown must not only be consistent with guilt, but inconsistent with every reasonable hypothesis of innocence. 2 Brickwood Sackett In structions to Juries, Sec. 2491, et seq. We have said that this well-settled instruction in regard to the degree of proof required where circumstantial evidence is relied upon is merely another statement of the doctrine of reasonable doubt as applied to circumstantial evidence."

The case of *Kassin vs. U. S.*, (CCA5) 87 Fed. (2nd) 183, 184, citing with approval on this point the case of *Paddock vs. U. S.*, supra, is particularly in point.

The testimony of mailing, standing alone, and as aided by the United States Attorney's interpretation of it, leads to the conclusion that the Government

has not sustained the burden of proving, beyond a reasonable doubt, that these defendants used the mails to execute the schemes alleged in the indictment. Accordingly, the motion to direct the verdicts should have been granted.

CONCLUSION

More should not be said in view of the proportions of the brief. Much more could be said, but we respect the admonition that there must be a limitation to errors assigned. The record contains many errors not assigned, which we shall not point out. A random inspection of the record will reveal them.

We hold in high esteem learned counsel who represented the Government below, but the record, as we have pointed it out, justifies the assertion that they looked more to gaining the verdicts than finally sustaining them.

Prejudicial errors, we think, have been demonstrated, to the end that justice and right require that they be corrected. Accordingtly, these defendants respectfully urge:

First: That the order of the trial Court overruling the special demurrers to the indictment for duplicity be reversed, and the cause remanded with directions to sustain the special demurrers.

Second: That, in the event the indictment is sustained, then, because of the insufficiency of the evidence to prove, beyond a reasonable doubt, that these defendants mailed the indictment letters, and the consequent error of the trial Court in refusing

to direct the verdicts for these defendants, that the judgments be reversed with directions to dismiss the cause (Vol. 2, R. C. L. p. 282, Sec. 237).

Third: That, in the alternative, the judgments be reversed with directions to grant a retrial.

Respectfully submitted,

LESLIE C. HARDY,

Attorney for Appellants, Jesse H. Shreve and Archie C. Shreve

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On the Brief.

APPENDIX

DEFENDANTS' OFFER OF PROOF

Defendants' offer of proof, which was filed with the Clerk, after the trial court had refused to permit the offer to be made, is as follows:

> We now offer to prove by this witness that a conversation took place at San Diego, California, during the summer or fall of 1931, at San Diego, California, between Jesse H. Shreve, Glen O. Perkins, John C. Hobbs and this witness A. C. Shreve, at which time substantially the following conversation was had:
>
> Mr. Perkins stated that Security B & L was having heavy demands for withdrawals by its depositors and that the association was unable to meet the demands; that it would be necessary for them to borrow $50,000; that he wanted to make arrangements in San Diego or somewhere to borrow $50,000 for and on behalf of the Security B & L., Century Investment Trust and Arizona Holding Corp. Jesse H. Shreve stated that he was in no position to make the loan, that he could not arrange such loan and did not know of any place where such loan could be obtained. Mr. Perkins then stated that he would like to have some advice as to what course the building and loan assn. could follow. A. C. Shreve stated that unless they could meet the demands for withdrawals or arrange for a loan to meet them, or

make some satisfactory arrangements that it was his opinion that they would be placed in the hands of a receiver. Mr. Hobbs and Mr. Perkins stated that they believed they could make the necessary arrangements somewhere else, if we were unable to assist them, and keep the business going and finally meet the demand. At that conversation A. C. Shreve asked if their minutes and books of the meetings of Security B & L, Ariz. Hold. Corp. and C. I. T. were up to date, to which Mr. Perkins and Mr. Hobbs both replied that the books of both offices were up to date; they also stated that the minutes of meetings of the officers and directors were up to date, as they had been kept from the beginning of each Company (R. 791, 792).

* * * *

Defendants offer to prove by this witness that a conversation took place between Jesse H. Shreve, Glen O. Perkins and this witness, being the only persons present, held early in December, 1929, in the office of the Security Building and Loan Assn. and Century Investment Trust on the ground floor of the Adams Hotel Building, on Central Avenue in Phoenix, Arizona, substantially as follows:

Jesse H. Shreve stated that he was going to withdraw from further participation in any management, control and operation of the Security Building and Loan Assn., Century Investment Trust and Arizona Holding Company; that he would give a reasonable time, but not to exceed two or three months, so that someone else could

take his place. Glen O. Perkins stated that he was sorry but that he would make arrangements for someone to take over the interests of Jesse H. Shreve and Archie C. Shreve in those corporations; that he would arrange to relieve Jesse H. Shreve and Archie C. Shreve of all further liability for the operation, management and control of the three companies; that he would be able to make this arrangement within not to exceed ninety days. Jesse H. Shreve thereupon stated that he thought that the deals pending for the exchange of stock of Century Investment Trust for stock of other corporations, particularly those represented in San Diego, California, should be rescinded. Mr. Perkins replied that such arrangement would be agreeable to him and that he would work the matter out. Mr. Perkins requested that A. C. Shreve assist him from time to time for two or three months in connection with the affairs of the three corporations. A. C. Shreve stated that he would give some of his time to the business, that part of his time would have to be devoted to the affairs of the Overland Hotel and Investment Company in connection with the Santa Rita Hotel at Tucson, Arizona, and that part of his time would be required in connection with his employment and business at San Diego, California (R. 792, 793).

* * * *

We offer to prove by this witness that a conversation took place between Daniel H. Shreve, Jesse H. Shreve, Glen O. Perkins, and this witness some time during the month of February, 1930, at San Diego, California, at which conver-

sation no one else was present, which conversation was substantially as follows:

Daniel H. Shreve stated that he had been to Phoenix, Arizona, and looked into the affairs of the Security Bldg. & Loan Assn., Century Investment Trust and Arizona Holding Corporation; that he had concluded to purchase and take over all of the interest of J. H. Shreve and A. C. Shreve in those companies; that he in conjunction with Glen O. Perkins and Mr. Hobbs would assume complete responsibility for the operation, management and control. Mr. Perkins stated that such arrangement was satisfactory and agreeable to him. J. H. Shreve and A. C. Shreve stated that they had discussed the matter with them and that they had transferred and delivered to Daniel H. Shreve all of their stock in said corporation (R. 793, 794).

* * * *

We now offer to prove that there was a conversation held between Glen O. Perkins, A. C. Shreve and Jesse H. Shreve early in 1930, at the office of the Security Building and Loan Assn., Adams Hotel Bldg., Phoenix, Arizona, at which time substantially the following conversation took place:

Mr. Perkins presented a printed circular bearing a printed signature purporting to be a facsimile signature of J. H. Shreve, and stated that that circular had been written and had been printed by certain salesmen working under he, Mr. Perkins. J. H. Shreve thereupon stated that

the circular must not be circulated or distributed, that is was wholly without his authority, that he did not and would not approve of it, that he had not authorized it, and would not permit it to be criculated. J. H. Shreve further stated that he had no connection with the operation, management or control of the company and did not want his name to be used in conection with it; that he had formerly withdrawn from further participation in the affairs of the company, except in a nominal capacity, awaiting Mr. Perkins' promise to replace him on the board of directors and as an officer of the companies, and that he was expecting him to carry out the promise which he had made in December, 1929 (R.797, 798).

SUBDIVISION (c), RULE 43 OF RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES, ADOPTED BY THE SUPREME COURT OF THE UNITED STATES.

Rule 43 (EVIDENCE) (c) RECORD OF EXCLUDED EVIDENCE. In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, the examing attorney may make a specific offer of what he expects to prove by the answer of the witness. The court may require the offer to be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. In actions tried without a jury the

same procedure may be followed, except that the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged.

ASSIGNMENT OF ERROR

XXV

The Court erred in admitting in evidence Government's Exhibit 207, which was received in evidence over the following objection and exception by counsel for defendants:

"MR. HARDY: We object, because it appears to be addressed to Manuel K. King, and for the further reason it is a printed pamphlet. The true name of J. H. Shreve does not appear on here as President of the Century Investment Trust, but it is in sterotype form; it is not the original signature.

MR. PETERSON: Identified by the witness as being a facsimile signature.

MR. HARDY: Very well, that does not make it an original signature, and the absence of some proof that J. H. Shreve, the defendant here, knew that this circular was mailed, or caused it to be mailed; the mere fact that a fac-simile signature appears on there, we don't think is sufficient to entitle it to be admitted in evidence. It is hearsay. It is incompetent as to him.

THE COURT: It may be received.

MR. HARDY: And another objection; the mere fact that Mr. King took it from the post-office is no proof it was mailed to him. There has not been any proof it was mailed to him, and in addition, it appears on the face of it that it is not addressed to this witness.

THE COURT: It may be received.

MR. HARDY: Exception."

The full substance of said exhibit is as follows: An invitation of the Board of Directors of Century Investment Trust, extended at the request of J. H. Shreve to Manuel "K." King, disclosing J. H. Shreve as President, San Diego, California, and mentioning A. C. Shreve, Phoenix, Arizona, Vice-President and Director and Officer of several financial institutions of Arizona and California. The exhibit recites, among other things, that Century Investment Trust owns entirely, others in which it owns control, and others in which it has a stock ownership, Security Building and Loan Association, First National Bank of Prescott, Arizona, Citizens State Bank, Phoenix, Arizona, Arizona Holding Corporation, Phoenix, Arizona, Sunset Building and Loan Association, San Diego, California, Commonwealth Building Company, San Diego, California, United States National Bank, San Diego, California, First National Bank, Oceanside, California, Southwest Union Securities Corporation, San Diego, California. The pamphlet or circular further states that the present stock offering of Century Investment Trust is to provide funds with which to purchase under the present most favorable conditions, additional banking institutions, building and loan companies, seasoned securities which have a

long period of successful record, and every form of profitable investment offering, to the end that Century Investment Trust may be known as a giant financial institution not only of "Arizona for Arizona" but of the "West for the West." It further recites that Century Investment Trust is a prosperous, healthy and growing corporation. It invites the addressee in the name of the Company and Board of Directors to join the Company before the very early advance in the price of stock of Century Investment Trust. (R. 943).

SECTIONS 661 and 688, TITLE 28, USCA.

Section 661. COPIES OF DEPARTMENT RECORDS AND PAPERS; ADMISSIBILITY. Copies of any books, records, papers, or documents in any of the executive departments authenticated under the seals of such departments, respectively, shall be admitted in evidence equally with the originals thereof. (R. S. Sec. 882).

Section 688. PROOFS OF RECORDS IN OFFICES NOT PERTAINING TO COURTS. All records and exemplifications of books, which may be kept in any public office of any State or Territory, or of any country subject to the jurisdiction of the United States, not appertaining to a court, shall be proved or admitted in any court or office in any other State or Territory, or in any such country, by the attestation of the keeper of the said records or books, and the seal of his office annexed, if there be a seal, together with a certificate of the presiding justice of the court

of the county, parish, or district in which such office may be kept, or of the governor, or secretary of state, the chancellor or keeper of the great seal, of the State, or Territory, or country, that the said attestation is in due form, and by the proper officers. If the said certificate is given by the presiding justice of a court, it shall be further authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified; or, if given by such governor, secretary, chancellor, or keeper of the great seal, it shall be under the great seal of the State, Territory, or country aforesaid in which it is made. And the said records and exemplifications, so authenticated, shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices of the State, Territory, or country, as aforesaid, from which they are taken. (R. S. Sec. 906).

SECTION 4458, REVISED CODE OF ARIZONA, 1928. Certified copies, under the hands and official seals, if there be seals, by all state and county officers of all documents properly on file with such officers, shall be received in evidence as the originals might be received. Every written instrument, except promissory notes, bills of exchange, and the last wills of deceased persons, may be acknowledged as deeds are required to be acknowledged, and when so acknowledged shall be received in evidence without other proof of execution. (1745-6 R. S. '13, cons. & rev.)

PROCLAMATION DECLARING ARIZONA ADMITTED AS A STATE

By The President of the United States of America.

A Proclamation.

February 14, 1912.

WHEREAS, the Congress of the United States did by an Act approved on the twentieth day of June, one thousand nine hundred and ten, authorize the people of the Territory of Arizona to form a Constitution and State government, and provide for the admission of such State into the Union on an equal footing with the original States upon certain conditions in said Act specified; and

WHEREAS, said people did adopt a Constitution and ask admission into the Union;

NOW, WHEREAS, the Congress of the United States did pass a joint resolution, which was approved on the twenty-first doy af August, one thousand nine hundred and eleven, for the admission of the State of Arizona into the Union, which resolution required that, as a condition precedent to the admission of said State, the electors of Arizona should, at the time of the holding of the State election as recited in said resolution, vote upon and ratify and adopt an amendment to Section One of Article VIII of their State Constitution, which amendment was

proposed and set forth at length in said resolution of Congress.

AND WHEREAS, it appears from information laid before me that the first general State election was held on the twelfth day of December, one thousand nine hundred and eleven, and that the returns of said election upon said amendment were made and canvassed as in section seven of said resolution of Congress provided;

AND WHEREAS, it further appears from information laid before me that a majority of the legal votes cast at said election upon said amendment were in favor thereof, and that the governor of said Territory has by proclamation declared the said amendment at part of the Constitution of the proposed State of Arizona;

AND WHEREAS, the governor of Arizona has certified to me the result of said election upon said amendment and of the said general election;

AND WHEREAS, the conditions imposed by the said Act of Congress approved on the twentieth day of June, one thousand nine hundred and ten, and by the said joint resolution of Congress have been fully complied with;

NOW THEREFORE, I, WILLIAM HOWARD TAFT, President of the United States of America, do, in accordance with the provisions of the Act of Congress and the joint resolution of Congress herein named, declare and proclaim the fact that the fundamental conditions imposed

by Congress on the State of Arizona to entitle that State to admission have been ratified and accepted, and that the admission of the State into the Union on an equal footing with the other States is now complete.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this fourteenth day of February, in the year of our Lord one thousand nine hundred and twelve and of the Independence of the United States of America the one hundred and thirty-sixth.

(Seal) WM. H. TAFT.

By the President:

HUNTINGTON WILSON,
Acting Secretary of State.

XX

The Court erred in admitting in evidence Government's Exhibit 71, which was received in evidence over the following objection and exception by counsel for defendants:

"MR. HARDY: Now, your Honor, we object to the receipt of the books in evidence identified as Government's Exhibit Nos. 71, 72, 73, 74, 75,

77 and 78, for the reason that it appears from the testimony of the witnesses for the Government that the books and records embraced by those exhibits marked for identification are not books and records of original entry, and that they are not the first permanent transaction, and that these books and records reflect entries which are transcribed from other tickets, documents or memoranda. For the further reason that the books and records as to the defendants an trial are hearsay. They are secondary evidence and not the best evidence of the transactions indicated by the books. And for the further reason it has not been shown that the defendants on trial either directed, supervised or caused any of the entries in those books to be made.

THE COURT: Overrule the objection.

MR. HARDY: Exception."

The full substance of said exhibit is as follows: General Ledger Security Building and Loan Association, subdivided and marked Assets, Liabilities, Capital, Income, Expense—Tucson Assets, Liabilities, Revenues, Expenses. First item under Assets dated Nov. 23, 1929, account secured by loans on real estate, setting forth various accounts to various persons, including W. H. Perry, A. W. York, Loan No. 37, Shumway Loans Nos. 36 and 44, Rayburn Loans Nos. 26 and 27, York Loan No. 19, Dreyfus Loan No. 41, Arrington Loans Nos. 39 and 42. Also sets forth loans secured by stock of Association; loans secured by United States and Arizona bonds; Investment Certificates of Association and banks; Furniture and Fixtures; Supplies—inventory; Prepaid in-

surance; Items in process of Collection; Cash on hand, first item dated Nov. 22, 1929; account with Commercial National Bank, Phoenix, Arizona; account with Arizona Bank; Citizens State Bank; First National Bank of Prescott; The Valley Bank, Mesa; Bank of Chandler; Mesa Agency, Globe Agency; Sunset Building and Loan Association, San Diego, California, pass book No. 3756, first entry Nov. 22, 1929; Century Investment Trust, first entry Nov. 22, 1929; Century Investment Trust insurance account; Century Investment Trust clock account. Liabilities: Loans secured by real estate repaid, first entry March 31, 1930; Investment Certificate passbook shares, first entry Nov. 22, 1929; Installment Investment Certificates Class D, first entry May 10, 1930; Installment Investment Certificates Class E, first entry March 25, 1930; Installment Investment Certificates Class F, first entry April 10, 1930; Income Certificates, first entry March 1, 1930; Full Paid Investment Coupon Certificates Full Paid Investment Non-Coupon Certificates; entries of Tucson office Security Building and Loan Association; Notes Payable, Notes Payable to Banks, Loans Real Estate Incomplete, first entry Nov. 22, 1929, disclosing various loans to various parties including Shumway loan No. 38, Arrington Loan No. 39, York Loans Nos. 19 and 37, Rayburn Loans Nos. 26 and 27, Dreyfus Loan No. 41, and Arrington Loan No. 42; Cash, first entry Jan. 19, 1930; Escrow Account; Capital; Undivided Profits Dec. 31, 1930, $3,176.13 (red), Undivided Profits Dec. 31, 1931, $3,040.16, Profit and Loss Dec. 31, 1930, $3,363.28 (red); Reserve Jan. 31, 1931, $135.97 (red); Profit and Loss Dec. 12, 1930, $187.15; Income, interest on loans, first item Jan. 2, 1930; Interest other than loans, first item Dec. 31, 1930; Profit and Loss Dec. 31, 1930, $1,-

392.30 (red); Interest investments, real estate loans, first item Jan. 29, 1931; Fees and commissions, first item Dec. 31, 1929; fees on loans, first item Jan 31, 1931; Fees other than loans, first item May 31, 1930; Expenses: salaries of officers, first entry Dec. 31, 1930; Legal fees and salaries, first item Jan. 24, 1930; Salaries employees, first item Jan. 22, 1931; Various items including accounting and auditing fees, agents commissions, rents, advertising and publicity ,taxes and licenses, interest on notes payable, interest on full-paid investment certificates, interest on full-paid investment coupon certificates, interest on full-paid interest non-coupon certificates, interest on investment certificates pass-book, interest on monthly income certificates, telephone and telegraph, sundry supplies and expenses, insurance, postage and stamped envelopes. Revenues, Expenses, title expense, donations, flowers and trimming expense, automobile expense, travel expense, prepaid insurance, accrued interest, Sundry supplies and expense, with notation "Items on this sheet transferred to detail sheets on June 13, 1930, E. F. Y." Interest on loans, interest on investments, fees on loans, other fees, salaries other than officers, control account, salaries other employees, control account, agents commissions and salaries, control account, legal fees and salaries, control account, auditors fees, control account, rent, control account, advertising and publicity, control account, taxes and licenses, control account, income discounts, control account, interest on notes payable, control account, interest on full-paid certificates, control account, interest an pass-book accounts, control account, interest paid on deposits, control account, sundry interest paid, control account, printing and stationery, control account, telephone and telegraph, control account, sundry supplies and

expenses, control account, new accounts expense, control account, insurance, control account, postage and stamped envelopes, control account, revenue stamps, control account, title expense, control account, donations, control account, flowers and trimmings, control account, automobile expense, control account, travel expense, control account, bank service expense, cash short, control account, interest on full-paid investment certificates non-coupon, control account, expense account, Mesa Agency, control account, Arizona Bank control account, Expenses Advances, control account, Prepaid insurance control account, accrued interest receivable control account, escrow account control account. Tucson office: Assets: Loans, first entry April 19, 1929; loans secured by stock in Association, first entry 6-26-30. Investment Certificates other building and loan associations, furniture and fixtures, cash account, first entry March 8, 1929; Arizona-Southwest Bank, first entry March 22, 1929; Commercial National Bank, first entry April 6, 1929; Consolidated National Bank, first entry June 1, 1929; Old Dominion Bank, first entry May 15, 1930; Phoenix office Security Building and Loan Association, first entry Nov. 23, 1929; Bisbee Agency, first entry Dec. 30, 1930; Sunset Building and Loan Association, first entry May 1, 1930; Principal and interest (Overland Hotel mortgage) $30,860.43; United States and Arizona bonds owned, State Treas. March 8, 1929, $50,000.00; Certificates of Account, first entry March 8, 1929; First National Bank of Prescott, 5 entries of $10,000 each, same date; to State Treasurer $50,000. Items in process of collection. Liabilities: Investment Certificates Account pass-book, first entry 3-8-29; monthly income investment certificates, first entry 9-30-29; full-paid investment certificates, first en-

try 1-3-29; Installment Investment Certificates Class A, first entry 4-4-29; Installment Investment Certificates Class B, first entry 1-3-30; Installment Investment Certificates Class C. first entry 1-3-30; Installment Investment Certificates Class D, first entry 3-28-30; Installment Investment Certificates Class E, first entry 3-28-30; Installment Investment Certificates Class F, first entry 3-9-30; Full Paid Investment Certificates, first entry 10-31-30; Interest paid to Banks, first entry 6-25-30; Incomplete Loans, first entry 7-18-30; Capital Stock Account, first entry 3-8-30; Undivided Profits Account, Capital Stock Account, Capital Surplus, Undivided Profits, first entry 12-31-30, $455.70; Profit and Loss Account, first entry 6-2-29; balance $1,513.65, Profit and Loss Account, 12-31-30, Balance $456.70; Real Estate loan repaid, first entry 5-1-30; Revenues: Interest received account loans, first entry 1-4-30; fees on loans, first entry 1-3-30; interest on investments other than loans; first entry July 3, 1930; interest on Sunset Building and Loan certificates, balance $308.00; other fees, first entry 1-6-30; Expense account, first entry 4-13-29; Salaries other Officers, first entry 6-9-30; Salaries other employees, first entry 6-6-30; Agents commissions and salaries, first entry Nov. 10, 1930; Auditing and accounting, first entry 6-14-30; rent, first entry 7-14-30; Advertising and Publicity, first entry 6-9-30; Fees and Licenses, first entry 6-10-30; Interest on notes payable, first entry 6-25-30; interest paid account—full paid certificates, first entry 6-3-30; interest paid account pass book certificates, first entry 1-3-30; interest paid account pass book certificates, first entry 6-3-31; interest other deposits, first entry August 24, 1931; sundry interest paid, first entry August 15, 1930, printing and stationery, first en-

try 6-9-30; telephone and telegraph, first entry May 7, 1930; sundry supplies and expenses, first entry 1-7-30; new account expense, first entry 1-14-30; insurance, first entry 5-20-30; postage and stamped envelopes, first entry 1-29-30; title expense, first entry Jan. 20, 1930; donations, first entry March 24, 1930; dues and subscriptions, first entry Dec. 3, 1930; flowers and trimming account, first entry Dec. 31, 1931; travel expense, first entry 7-15-30; automobile expense, first entry 7-10-30; cash short, first entry 1-20-31; interest on full paid investment non-coupon certificates, first entry Nov. 1, 1930. (R. 932).

SECTIONS 695 AND 695h, TITLE 28, USCA.

Sec. 695. ADMISSIBILITY. In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memodandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility.

The term "business" shall include business, profession, occupation, and calling of every kind. (June 20, 1936, c. 640, pp 1, 49 Stat. 1561).

Sec. 695h. PROSPECTIVE NATURE OF SUBCHAPTER. Sections 695 to 695h of this title shall be prospective only, and not retroactive. (June 20, 1936, c. 640, pp 9, 49 Stat. 1564).

TESTIMONY OF GOVERNMENT'S WITNESS WATT ON CROSS EXAMINATION, WITH REFERENCE TO ASSIGNMENTS OF ERROR XVIII, XIX AND XX, RELATING TO ADMISSIBILITY OF BOOKS AND RECORDS OF ARIZONA HOLDING CORPORATION, CENTURY INVESTMENT TRUST AND SECURITY BUILDING AND LOAN ASSOCIATION. (R. 344 to 354).

"I have identified Government's Exhibit 61 as the general ledger of the Century Investment Trust. Ordinarily I kept it. I can not say that there are not some entries in here made by someone else without a complete inspection of it. (The witness inspected the book.) That is all entirely in my handwriting. It is not the first book of entry recording these transactions; that is a general ledger of the Century Investment Trust. I worked on those books during June of 1930. The entry dated October 30, 1929, was made before I went to work for the corporation. I made that entry.

Q. From what information did you make that entry?

A. Well, I rewrote the books of the Century Investment Trust from whatever information I could get the necessary information from—from whatever source, I should say.

Q. You rewrote all of the books of the Century Investment Trust?

A. Not entirely, no.

The witness continuing: The three books, or parts of them, which I rewrote, are Government's Exhibit 63 for identification, which is the journal voucher of Century Investment Trust, Government's Exhibit 62 for identification, which is a book marked "Century Investment Trust," and Government's Exhibit 61 for identification, which is marked "General Ledger Century Investment Trust."

Q. And at whose direction did you rewrite those books?

A. D. H. Shreve.

Q. You mean Daniel H. Shreve?

A. Yes, sir.

Q. And what information did you have, or what records did you have from which you rewrote those books?

A. Had the old books, deposits in the Security Building and Loan, and the bank deposit slips. I believe, and check stubs, cancelled checks and

what other—what information I could get from Mr. Shreve regarding certain transactions which were not clear of themselves.

Q. When you say "Mr. Shreve" you mean Daniel H. Shreve?

A. Yes, sir, as I previously testified.

The witness continuing: To a great extent I relied upon information I found myself in order to rewrite these books. I do not know where the books and records are from which I rewrote these books. I know what I did with them after I completed rewriting the books. The old pages were put there in the office in one of the files, and I don't know whatever happened to them.

Q. Well, then, these books which have now testified about are not books of original entry?

A. Well, I think that is asking for an opinion on my part.

Q. Well, they were not originally—they were not made by you from information that came to you direct; they were made from information made by someone else, were they not, or records or entries made by someone else?

A. Yes, sir.

Q. Did you make the original entries from which these books were rewritten?

A. Do you mean like check-stubs or deposit slips?

Q. From whatever source you got this information, did you make the original entries?

A. No, sir.

Q. You did not?

A. No, sir.

Q. Do you know who made them?

A. I don't know.

Q. Well, now, did you copy some of those books in Exhibits 63 and 61 and 62 from other books?

A. From the other books.

Q. From other books?

A. Yes, sir. Some of the entries probably are the same as they were in the old book, but there were many transactions that were not recorded or were not recorded properly in the old books.

Q. And those which you thought were improperly recorded in the old books you recorded, made new entries of those in these books?

A. Yes, sir.

Q. And that you did on your own responsibility?

A. No, sir.

Q. At whose direction?

A. Daniel H. Shreve.

Q. Daniel H. Shreve?

A. Yes, sir.

Q. Did either J. H. Shreve or A. C. Shreve ever request you or counsel with you in the rewriting of those books?

A. Not that I recall.

Q. And the information which you got to rewrite these books, you don't know whether it was correct or not, do you, Mr. Watt?

A. No, I have no way of knowing of my own personal knowledge.

Q. You were just taking what somebody else had said?

A. I believed it to be correct.

Q. You merely believed it to be correct?

A. Yes, sir.

The witness continuing: I did not rewrite

any books of the Security Building and Loan Association, except trace entries in the Building and Loan books which pertained to the Century Investment Trust or the Arizona Holding Corporation. I traced them from the rewritten books of the Century Investment Trust. I did not rewrite any books of the Arizona Holding Corporation. This was in June, 1930. I am referring to. There had been no entries made in the books of the Arizona Holding Corporation since November 4th or 5th, 1929. I opened a set of books and brought those up to date.

Q. Where did you get the information from which you brought those books up to date?

A. From the same sources I got the other information: Deposit slips and check stubs, cancelled checks, deposits in the Building and Loan.

Q. And those were records and documents made by someone else?

A. Yes, sir.

Q. And you don't know whether they were correct or not?

A. Not of my own knowledge.

Q. Yes. And who directed you to make those entries about which you have testified in the Arizona Holding Company books?

A. D. H. Shreve.

Q. You mean Daniel H. Shreve?

A. Yes, sir.

Q. Did J. H. Shreve or A. C. Shreve give you any directions with respect to those books?

A. Not that I recall.

The witness continuing: I can select the books of the Arizona Holding Company with respect to which I made those entries. I refer to Government's Exhibit 70, 69, 68, 65, 66 and 67 for identification. Some entries in exhibits numbered 69 and 70 of the Arizona Holding Company are reflected from the rewritten books of the Century Investment Trust, because there were some transactions that ran through the three compaies; had to give them proper effect in the books of these two corporations. These rewritten entries in the Century Investment Trust had a bearing thereafter upon the books of the Security Building and Loan Association; they had a bearing before that time, if I understand your question correctly. It was not necessary to make any changes in the books of the Security Building and Loan Association because of the rewriting of the books of the Century Investment Trust. I did not rewrite any of the books of the Security Building and Loan Association.

Government's Exhibits 61 and 68 for identification, inclusive, are books and records of the Century Investment Trust. Those books and records contain entries of transactions which happened after October 24, 1931. I think that is

true. They do with the possible exception of the insurance accounts receivable and the policy register is not here. I can't answer that definitely without inspecting the entries. They all contain entries subsequent to October 24, 1931. Government's Exhibits 67 and 70 for identification contain entries of transactions which happened after October 24, 1931. They contain a number of such entries. Some entries in Government's Exhibits 61 to 70 for identification, inclusive, are not made by me. Some of them were made by Miss E. F. Young. I think Mrs. Harrington and Miss Harrison may have. Miss Goudy wrote insurance policies and the copy of the bill which was filed here in the insurance accounts receivable, whether it was made out by her on the typewriter at the time— not in her handwriting. They were made out by her on the typewriter and that record was transferred into this books, being Government's Exhibit 64 for identification. I probably inserted those records myself. Other than that I did not make the entries which went into the book. I would say, offhand, there are about four handwriting altogether in those books, including myself. I can identify some of this handwriting. Miss Young and I made entries in these books and one or two of the entries are in a handwriting I am not familiar with. I know it is neither the handwriting of Miss Young or myself. There are two handwritings in these books with which I am not familiar. That applies only to the books of the Century Investment Trust. I believe the books of the Arizona Holding Corporation, Government's Exhibits 69 and 70 for identification, are entirely in my own handwriting, with the exception of one five dollar

credit which I mentioned the other day, an account of James Gammell, and some pencil notations which do not affect the balance. I do not know who made the item which is not in my handwriting. Some of the entries of transactions in the books identified as Government's Exhibits 61 to 70 inclusive were of transactions which occurred prior to the time I went to work for the Century Investment Trust or the Arizona Holding Corporation. The first date of such transaction set up in the books of the Century Investment Trust is October 30, 1929, and I was not working for the Century Investment Trust at that time, but I made that entry in Government's Exhibit 63 for identification. I presume I got that information from the Articles of Incorporation. That was made setting up the capital stock, and states so on the voucher. Referring to Government's Exhibit 62 for identification, which is a book of the Century Investment Trust, and to the page under the subdivision of the Commercial National Bank, No. 102-1, the dates of those transactions are November 20th and on down to December 5th, 1929. I was not connected with the Century Investment Trust at that time. I knew nothing about these transactions except from information I could gather from original sources or from any other information. Mr. Dan Shreve knew about some items. I don't know that he did back this far but the check stubs in most cases would indicate what the charge was to be on the item.

Q. The items appearing on that page which were made by you are not the original entries of those transactions?

A. No, I presume they were not.

Q. They were transcribed by you into that record from other entries, or documents, or records?

A. Yes, sir.

Q. Or from informtion which you gathered from place to place?

A. Yes, sir.

The witness continuing: Those are original entries in the books of the Arizona Holding Corporation, being Government's Exhibits 69 and 70 for identification. There have not been any bookkeeping entries made from about November 4th or 5th, 1929, until about June, 1930. Some of those entries in those Arizona Holding Corporation books were based upon or made from entries which then existed in the books of the Century Investment Trust. At the time I became associated with the Arizona Holding Corporation no entries had been made in those books of that corporation for several months prior thereto.

Q. And what did you do with those books?

A. I brought them up to date.

A. From the original sources of information wherever I could find it, deposit slips, depositors in the Building and Loan, check stubs.

Q. Were those deposit slips, check stubs and other data made by you?

A. No, sir.

Q. Made by someone else?

A. Yes, sir.

Q. By whom?

A. I could not answer that now. (R. 344 to 352).

* * * *

RE-DIRECT EXAMINATION

MR. PETERSON: Q. Mr. Watt, in making the entries in the exhibits of the Century Investment Trust and the Arizona Holding Company, were those entries made from the original sources the same as if all the entries had been made when the transactions occurred, and in the regular course of business?

MR. HARDY: Well, your Honor, we object to that, because it calls for a conclusion of the witness and because he has already testified from what sources the entries were made.

THE COURT: He may answer.

MR. HARDY: Exception.

THE WITNESS: They were made in that way, yes, sir." (R. 354).

EVIDENCE OF MAILING INDICTMENT LETTERS

COUNT ONE—Letter addressed to Fred Sweetland. With respect to this letter Government's witness Hobbs testified:

"That is my signature on Government's Exhibit 159 for identification.

Q. Was that letter mailed in the regular course of business of the Security Building and Loan Association?

MR. HARDY: We object to that, your Honor, it is incompetent, irrelevant and immaterial, in the regular course of business, and leading.

THE COURT: He may answer.

MR. HARDY: Exception.

THE WITNESS: Yes, this letter was mailed in the regular course of business.

The witness continuing: Government's Exhibit 159 for identification is signed by me as Vice-President and Secretary of the Building and Loan Association. I don't know that I actually mailed the letter myself. Someone in the office mailed it. I don't recall the details. It is a form letter. I am not certain that the form was prepared or attached by me. The letter apparently was dictated by me to Mrs. Fricke and signed by me. *I could not say as to J. H. Shreve or Archie Shreve assisting in the preparation or*

the mailing of the letter. Sometimes these form letters came to us in a box or group and we simply mailed them out from Tucson. Sometimes we copied the letter, the letter that was sent us, and mailed them out from there. It would indicate I dictated this letter myself." (R. 573, 574).

COUNT TWO—Letter addressed to O. Hohenstein. With respect to this letter Government's witnessWatt testified:

"I signed the slip enclosure in the envelope marked Government's Exhibit 161 for identification. That enclosure was mailed in that envelope in the general course of business of the Security Building and Loan Association.

MR. HARDY: We object to that, your Honor. There is not sufficient proof of the mailing.

THE COURT: Well, he may answer.

THE WITNESS: Yes, sir; it was.

The witness continuing: I recall making that slip myself, and that is my signature upon it.

MR. PETERSON: We offer Government's Exhibit 161 in evidence.

MR. HARDY: (On voir dire examination) Government's Exhibit 161 for identification is a duplicate slip. It is all in my handwriting. I do not know that I addressed the envelope. It is typewritten, I could not tell. *Neither of these defendants had anything to do directly with the*

preparation or mailing of Exhibit 161 for identification. This is the ordinary form of deposit slip which was mailed out to depositors of the Security Building & Loan Association." (R. 603).

COUNT THREE—Letter addressed to Henry Baker. With respect to this letter Government's witness Shumway testified:

"MR. PETERSON: I will hand you Government's Exhibit 166, being an envelope, and 167 for identification, particularly calling your attention to Government's Exhibit 167, being the letter, and ask you if *any letters of that type were mailed from the Mesa office?*

MR. HARDY: We object to that, your Honor. It calls for a conclusion of the witness when he asked if letters of that type were bing mailed out of the Mesa office.

THE COURT: He may answer.

MR. HARDY: Exception.

THE WITNESS: Yes, sir.

The witness continuing: Those letters were mailed in the regular course of business from the office of the Security Building and Loan Association." (R. 719, 720).

COUNT FOUR—Letter addressed to Wesley Palmer. With respect to this letter Government's witness Perkins testified:

"The letters which are Government's Exhibits 161 and 162 for identification, were mailed out in the regular course of business. *It was the custom to mail those dividend letters out.*

MR. PETERSON: I offer in evidence Government's Exhibit 161 and 162 for identification, which is the letter testified to by Mr. Wesley Palmer, that he received this through the United States Mail.

MR. HARDY: Object to its receipt in evidence—their receipt in evidence upon the ground no proper foundation has been laid for its admission.

THE COURT: It may be received.

MR. HARDY: Exception.

MR. FLYNN: Just a minute, I think we have got the wrong numbers on that exhibit.

THE CLERK: This exhibit you offered is 162 and 163?

MR. PETERSON: I ask an order that that be changed.

THE CLERK: Exhibits should be 162 and 163 instead of 161 and 162." (R. 624, 625).

COUNT FIVE—Letter addressed to R. R. Guthrie. With respect to this letter Government's witness Hobbs testified:

"Q. (Mr. Peterson): I hand you Government's Exhibit for identification 164 *and ask you what the custom in mailing out those letters was,* and if you recognize the signature on that letter?

MR. HARDY: Just a moment, we would like to see the exhibit before he answers. With reference to this Government's Exhibit 164 for identification, Mr. Peterson, you are now asking Mr. Hobbs what the custom was in regard to mailing it out?

MR. PETERSON: Yes, sir; mailing letters of that type out.

MR. HARDY: We object, first, because the letter is not in evidence, therefore, no testimony with respect to a custom concerning the letter is now admissible, and the additional reason that a custom is irrelevant, incompetent and immaterial.

THE COURT: He may answer.

MR. HARDY: Exception.

The witness continuing: In the case of these dividend letters, I think they were generally prepared in the Phoenix office and mailed to us in a batch, and we addressed them to the proper people and mailed them out to our stockholders in Tucson. Sometimes those letters were signed when they left Phoenix, sometimes I signed them down there. I recognize the signature upon the exhibit I hold in my hand. It is the signature of D. H. Shreve. I don't recall Mr. Shreve signing those letters in the Tucson office.

Q. *Was it the custom* to receive those letters signed by Mr. Shreve in Phoenix and then mailed out of your office?

MR. HARDY: We object to the question, as to the custom. It is irrelevant, immaterial and no foundation has been laid for the custom.

THE COURT: He may answer.

MR. HARDY: Exception.

The witness continuing: Stockholders' letters were mailed from Phoenix and were usually signed in Phoenix and we simply addressed the envelopes in the Tucson office and put them in the mail there. Government's Exhibit 164 for identification, which I hold in my hand, is the class of letters I have just testfied in regard to." (R. 577, 578).

COUNT SIX—Letter addressed to O. H. Robson and Mary Robson. With respect to this letter Government's witness Perkins testified:

"That is my signature upon form letter being Government's Exhibit 165 for identification.

Q. *Was that mailed out in the general course of the business of the Century Investment Trust?*

A. We mailed out—yes, sir; those letters were mailed out, yes, sir.

MR. PETERSON: I offer Government's Exhibit 165 for identification in evidence, being a

letter which Mr. O. H. Robson testified he received through the United States mail.

MR. HARDY: Government's Exhibit 165 for identification, your Honor, purports on the face of it is addressed to O. H. Robson and Mary Robson. It is the position of the defendants that there isn't sufficient proof as yet to show that those were received through the mails by either of those persons. There is no positive testimony from Robson in that respect, and Mary Robson, another addressee in the letter, has not testified. There is no proper foundation laid yet.

THE COURT: It would not have to be received if it were deposited in the mail, would it?

MR. HARDY: Well, I should think the letter would have to be received, yes.

THE COURT: It may be received." (R. 623, 625).

COUNT SEVEN—Letter addressed to Helen Hannon. With respect to this letter Government's witness Perkins testified:

"The letter which is Government's Exhibit 173 for identification was a form letter *mailed out in the regular course of business.*

MR. PETERSON: I offer at this time Government's Exhibit 173 for identification, being a letter testified to by Mrs. Helen Hannon as having been received through the United States Mail —Helen Maynard.

MR. HARDY: Object to the receipt of Government's Exhibit 173 in evidence, upon the grounds no proper foundation has been laid for its admission.

THE COURT: It may be received.

MR. HARDY: Exception." (R. 626, 627).

COUNT EIGHT—Letter addressed to Harry Nelson and Anna B. Nelson. (Exhibit 168 and 169, R. 583, 584). With respect to this letter Government's witness Hobbs testified:

"Government's Exhibit 179 for identification is the same type of letter, is one of the dividend letters which I testified in regard to. D. H. Shreve's signature is on that letter. Government's Exhibit 181 for identification, being a letter, and 182, *is one of the type of form letter I have testifed in regard to.* Government's Exhibit 183 for identification, being a letter, and 184, being an envelope, is the type of dividend letters which I have testified in regard ot.

THE CLERK: You have 182, which was just marked for identification, is the same as 169 which has been heretofore marked for identification, and 184 which was just marked for identification is the same as 168 which has heretofore been marked for identification. 183 and 184 will not be assigned as any more exhibits. There was some testimony about 183 and 184, so we can't assign those numbers to any other exhibits." (R. 578, 579).

COUNT NINE—Letter addressed to Alice H. Davis. With respect to this letter Government's witness Perkins testified:

> "I recognize my signature upon the letter and envelope being Government's Exhibits 205 and 206 for identification. *That letter was mailed in the regular course of business* of the Security Building and Loan Association. I remember dictating the letter to the secretary; I signed it and told her to mail it." (R. 652).

COUNT TEN—Letter addressed to Lulu Gatlin. (Exhibits 179, 180, 181, R. 709, 710). With respect to this letter Government's witness Hobbs testified:

> "Government's Exhibit 179 for identification is the *same type of letter*, is one of the dividend letters which I testified in regard to. D. H. Shreve's signature is on that letter. Government's Exhibit 181 for identification, being a letter, and 182, is one of the type of form letters I have testified in regard to." (R. 578, 579).

COUNT ELEVEN—Letter addressed to Lulu Gatlin. (Testimony with regard to the letter set forth in this count is the same as testimony in Count Ten, supra.

In addition to the foregoing, Government's witness Hobbs, on cross examination ,testified as follows:

> *"I know that D. H. Shreve came over the early part of 1930 and took over the conduct of the Security Building & Loan Association, and*

also the other two companies, Arizona Holding Corporation and Century Investment Trust, and from that time on the business affairs of those corporations were discussed and transacted in the main between me and D. H. Shreve. As far as I was concerned D. H. Shreve became the active head of the business when he came over in the early part of the spring of 1930. As far as I was concerned I was in charge of the affairs and the business of the Tucson office, and I took my instructions thenceforth from D. H. Shreve. Government's Exhibit 164 for identification is signed by D. H. Shreve, meaning Daniel H. Shreve. That is D. H. Shreve's signature on that letter. It is a form for mimeographed letter. *It was the custom for Dan Shreve to send form letters from the Phoenix office for mailing from the Tucson office.* I do not know who actually mailed this letter which is marked Government's Exhibit 164 for identification. It was just mailed in the ordinary course of business of the Century Investment Trust at Tucson. I don't believe that form was available to any person upon the counter of the company at Tucson. I do not actually know who mailed this letter marked Government's Exhibit 164 for identification. I know it was the custom to mail that type of letter from the Tucson office. As a rule Mrs. Fricke took care of our mail there; that is the actual mechanical handling of it. *J. H. Shreve and A. C. Shreve didn't do the mailing down there.* I know that Government's Exhibit 164 is the type of letter that was mailed from the Tucson office. Government's Exhibit 179 for identification is a letter signed by D. H. Shreve, and also Government's Exhibit 191 for identification. They are form letters and it was

the practice to mail them to me at Tucson from the Phoenix office, and then in turn the Tucson office would mail these letters out to whomsoever they were addressed. I don't know personally whether either of these letters identified as Government's Exhibits 179 to 181 for identification were ever mailed from the Tucson office. Government's Exhibit 183 for identification is a letter signed by Glen O. Perkins. He was the same person I testified came over to Arizona and participated in the organization of the Arizona Holding Corporation with Mr. James, Dr. Thomas and Dr. Morris. That is his signature upon letter marked Government's Exhibit 183 for idenification. That letter apparently was mailed from Tucson. The envelope has a Tucson post mark. I do not know personally who mailed that letter. I do not know the exact time D. H. Shreve came here but I do know that after he came, as far as I was concerned, he was in charge of the company, and that would be up to the time the companies closed. I have no way of fixing the time that Dan Shreve came over. The only way I could fix it was in the order of sequence in which the various Mr. Shreves were in Arizona. Jesse was the first one, Archie was the next one and Dan was the last one." (R. 580, 581, 582).